82-1800

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No. .....

IN THE

Supreme Court of the United States

October Term, 1982

THE STATE OF CONNECTICUT,

Petitioner,

v.

GEORGIOS ZINDROS

Respondent,

On Writ of Certiorari to the Supreme Court of the State of Connecticut

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

FRANCIS M. MCDONALD
State's Attorney and Counsel of Record

PAUL E. MURRAY
Assistant State's Attorney and Counsel of Record

300 Grand Street
Waterbury, CT 06702
P. O. Box 1245
(203) 756-4431

QUESTIONS PRESENTED

1. Whether an owner-landlord of a burnt-out business premises which he was obligated to repair and which he had boarded up after a fire may consent to a search by fire investigators?

2. Whether the fire investigators may in good faith rely upon such a consent and in these circumstances whether suppression of the fruits of their search is required?

3. Whether the defendant-tenant's asserted expectation of privacy in such a premises is reasonable?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, the State of Connecticut, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on February 15, 1983.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 189 Conn. 228, 456 A.2d 288 (1983) and appears in the appendix hereto. (Appendix A). The decision of the Connecticut Superior Court granting the defendant's motion to suppress appears in the appendix hereto. (Appendix B).

JURISDICTION

The opinion of the Supreme Court of the State of Connecticut was entered on February 15, 1983. A motion to reargue was denied by the Connecticut Supreme Court on March 3, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Facts

On February 12, 1977, a fire occurred in a building at 812 Highland Avenue in Waterbury, Connecticut, a building owned by Mr. Louis Cipriano and leased to the defendant. (T-54-56, 101-02; Appendix F - State's Exhibit A). Mr. Cipriano had purchased the building approximately 18 months prior to the fire for a price of about $51,000.00. (T-55). Nothing had occurred in the interim to decrease that value. (T-55-56). Since the time of the purchase, Mr. Cipriano had installed wall-to-wall carpeting which was the subject matter of the motion to suppress. (T-57).

The building, which was used as a pizza restaurant, was heavily damaged in the fire. The premises was standing open with all the doors and glass broken out. (T-57). There was heavy interior smoke and smudge damage and half the ceiling was burned. (T-31-34, 45). Over one-third of the interior was charred and the entire interior would have to be gutted to make repairs. (T-46-47). The building was not fit for use and occupancy. (T-37, 51). Mr. Cipriano eventually received $21,000 from his insurance carrier for structural damage, an amount which did not fully cover the loss. (T-56).

Subsequent to the fire, on Sunday, February 13, 1977, Mr. Cipriano contacted the defendant and requested that he take steps to board up and secure the premises. This request was met with the defendant's statement that he was "out of business." Mr. Cipriano then called his own insurance carrier and was told to secure it himself, which he did. (T-58-59). The defendant denied that he was requested to board the premises. (T-122).

The defendant, who testified that he first learned of the fire on Sunday, February 13th at about noon, subsequently called the fire marshal "to see what happened." He was told that the marshal would meet him at the premises at 9:00 AM on Monday, February

14th. (T-107). Despite his interest in the premises he testified on direct examination that he made no effort to go there to inspect the damage on Sunday. (T-106). On cross-examination this was modified slightly and he stated that he went to the premises but, seeing that they were boarded up, made no attempt to enter. (T-123-24).

John Murphy, at the time a Captain in the Waterbury fire marshal's office, testified that he became aware of the fire on Monday, February 14, 1977. He and the marshal then went to the scene to investigate its origin. (T-22-23). The defendant testified that he wanted the fire marshal to determine what caused the fire and that the marshal was there at his request. (T-124). He testified further that it was he who removed the boards to allow the marshal to enter. (T-108). Capt. Murphy believed it was Mr. Cipriano who opened the premises but did recall the defendant being there and speaking with the marshal. The defendant showed them around the premises and did not ask them to leave. (T-23-24). They were unable to discover the cause that day but did discover the point of origin. They took nothing from the premises on that day. (T-24). Despite this, the defendant testified he was told by the marshal that it started in a corner with gasoline. (T-124-25). The defendant never told the fire marshal not to re-enter the premises and testified, "I can't stop anyone." (T-125).

On February 23rd the premises were again inspected. The fire was considered suspicious and the state fire marshal had been contacted. (T-34-35). Prior to going to the premises on the 23rd, Lt. Solomita and Det. Gary of the Waterbury Police Department spoke with Mr. Cipriano and explained that they wanted to go in to determine how the fire started. He agreed and subsequently went to the premises to remove the boards and grant the authorities entry. (T-6-14, 41, 60-61). Prior to this time the defendant's attorney had told Mr. Cipriano that the occurrence of the fire broke the lease. (T-59, 63, 72). On several occasions the defendant's attorney had called Mr. Cipriano and requested to be let into the build-

ing. (T-62). The defendant had told Mr. Cipriano that he was out of business. (T-58-59, 77). Mr. Cipriano felt that he had the right to let the police in. (T-64). He did so freely and voluntarily and also allowed them to remove a piece of charred carpeting. (T-66; Appendix D - Motion to Suppress, par. 2 at 1d). At no time did the police, fire authorities, or Mr. Cipriano seek permission from the defendant or seek a warrant. (T-15, 68).

Upon gaining access to the premises, entry was made by Trooper George Zuraitis of the state fire marshal's office, Capt. Murphy, Lt. Solomita, Det. Gary and a photographer, accompanied by Mr. Cipriano. (T-15, 26, 61). Trooper Zuraitis, for whom this was his first involvement in the investigation, checked the air with a hydrocarbon detector which went off the scale, indicating the presence of inflammable liquid used in the fire. (T-40, 42, 51). He then removed a small piece of charred carpeting for laboratory analysis. (T-15, 26, 42, 61; Appendix D - Motion to Suppress, par. 2 at 1d).

Subsequent to the fire the defendant never reoccupied the premises or reopened the restaurant. The building stood vacant for 7 months and was then sold. (T-66). Mr. Cipriano indicated that he sought but did not receive an additional month's rental from the defendant when his equipment remained in the premises, though he had been asked to remove it. (T-82-83).

The defendant testified that he understood the fire to break the lease. (T-120, 132-33). He eventually removed his restaurant equipment, fixed it, and opened another restaurant in a new location. (T-120-21, 127).

The lease which was in effect at the time of the fire provided that if the premises were rendered untenantable and unfit for occupancy by fire, the landlord could enter and repair with reasonable speed, with the rent ceasing until repairs were completed. (State's Exhibit A). The text of that provision is printed in the appendix. (Appendix F).

Rulings Below

In April of 1977, the defendant Georgios Zindros was accused of starting the fire at the Highland Avenue restaurant and charged with arson in the second degree in violation of Connecticut General Statutes Section 53a-112. *State v. Zindros*, 189 Conn. 228, 229-30, 456 A.2d 288, 291 (1983). (Appendix A at 1a).

On June 21, 1977, the defendant filed a motion to suppress all evidence, and related testimony, obtained during the February 23, 1977 search of the premises by police and fire officers. The defendant's claim was that the search was conducted without a warrant and without his consent. (Appendix D).

The trial court conducted an evidentiary hearing and in a memorandum of decision filed July 19, 1979, granted the defendant's motion to suppress the air samples and pieces of carpeting seized. (Appendix B). The trial court ruled that the defendant continued to have a reasonable expectation of privacy at the time of the search and that the landlord-owner was not an appropriate person to consent to the search. (Appendix B at 3b, 6b). No separate finding was made as to the objective reasonableness of the defendant's purported reasonable expectation of privacy, the Connecticut Supreme Court treating it as implicit in the ruling. *State v. Zindros*, 189 Conn. at 241-42, 456 A.2d at 296-97. (Appendix A at 11a).

On November 12, 1980, the information against the defendant was dismissed with prejudice (Appendix E at 1e), and the State was granted permission to appeal to the Connecticut Supreme Court. *State v. Zindros*, 189 Conn. at 230, 456 A.2d at 291. (Appendix A at 2a).

In a 3-2 decision issued February 15, 1983, the Connecticut Supreme Court found no error and upheld the granting of the defendant's motion to suppress. *State v. Zindros*, 189 Conn. 228, 456 A.2d 288 (1983). (Appendix A). That court concluded that the defendant did have a reasonable expectation of privacy, even after the fire and despite the actions of the landlord in secur-

ing the premises, and that the owner-landlord's consent was not sufficient. 189 Conn. at 242, 248-50, 456 A.2d at 297, 299-300 (Appendix A at 12a, 18a-20a). The defendant had conceded at oral argument before the Connecticut Supreme Court that the landlord could have entered and removed the carpeting himself but insisted that he could not permit law enforcement officials to do so. The Connecticut Supreme Court also rejected the State's claim that the officers had relied in good faith upon the landlord's consent and therefore the exclusionary rule should not apply. 189 Conn. at 250-55, 456 A.2d at 301-03. (Appendix A at 20a-25a).

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI IN THIS CASE WHERE THE CONNECTICUT COURTS MISAPPLIED THE EXCLUSIONARY RULE

A reasonable, practical and understandable application of the fourth amendment and exclusionary rule is required if the legitimate needs of law enforcement and respect for a citizen's privacy are to exist together. This Court had fashioned the remedy of the exclusionary rule for circumstances far different than those which arose in this case. It must exercise control over misapplications of the remedy which can only continue to erode public confidence in the administration of criminal justice. Increasing public dissatisfaction with applications of the exclusionary rule in circumstances where it is not called for should concern this Court, for reasoned public support and respect for law is the very basis of judicial power in this country. Applying the exclusionary rule, without considering the reasonable and legitimate needs of law enforcement and upon highly technical and sometimes impracticable grounds, by state courts has resulted in very many applications for certiorari filed by state prosecutors. The very heavy volume of those petitions represents both a burden upon and an opportunity to this Court. It also represents the increasing public awareness that the indiscriminate application of the exclusionary rule exacts an intolerable price in terms of the public safety and the search for truth.

As will be developed in later arguments, the Connecticut courts did apply the fourth amendment and the exclusionary rule in such a fashion and this Court should review their decisions.

II.

THE OWNER-LANDLORD MIGHT CONSENT TO A SEARCH OF PREMISES HE HAD THE RIGHT AND DUTY TO REPAIR

As was so well stated by Justice Shea of the Connecticut Supreme Court in his dissent below ". . . the majority opinion constitutes a wholly unwarranted and unprecedented application of the fourth amendment which serves as a kind of reductio ad absurdum to denigrate its salutary purpose. The opinion completely overlooks the legitimate interest of a landlord, whose building has been the subject of a suspected arson, in enlisting the aid of the police for the purpose of determining the cause of the conflagration . . . ." *State v. Zindros*, 189 Conn. 228, 256, 456 A.2d 288, 303 (1983) (Shea, J., dissenting) (Appendix A at 25a).

It has been recognized that a search conducted pursuant to consent properly obtained from an appropriate party is permissible as an exception to the warrant requirement. *Frazier v. Cupp*, 394 U. S. 731 (1969). Third-party consent may be appropriate where the consenting party "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U. S. 164, 171 (1974).

Landlord consent may be acceptable when the premises are not then in the exclusive possession of the lessee. This is true where the landlord is given temporary possession to perform certain activities in premises otherwise occupied by the lessee. *United States v. Botsch*, 364 F.2d 542 (2d Cir. 1966); 2 LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 8.5(a), at 739.

In the instant case the lessor had, by operation of a lease provision and the occurrence of the fire, a right to possession superior to that of the lessee. Giving the facts the construction most favorable to the defendant, the premises were untenantable but repairable within 90 days. In that case the appropriate section of the lease provided:

> [T]he Landlord may enter and repair the same with reasonable speed, and the rent shall not accrue after said injury or while repairs are being made, but shall recommence immediately after said repairs shall be completed.

(Appendix F at 1f). This case is thus clearly not analogous to those in which a landlord permits authorities' entry to a tenant's occupied room, the "hotel" cases.

Obviously the tenant, subsequent to the fire, was no longer in exclusive possession. He was not required to pay rent and in fact would have had an affirmative defense under this section of the lease had he been sued for non-payment. The landlord was given, by the lease, an absolute right to temporary possession to make necessary repairs and the corollary need to bring in workmen, subcontractors and others to make such repairs. Any owner repairing the premises would, of course, want to know the cause of the fire to eliminate future problems while making his repairs.

The landlord's interest and peculiar relationship with the object of the search was obvious and unique. This was not a general exploration of the premises of a tenant and the tenant's personal effects such as has generally been condemned. The search was by air sampling and the removal of a piece of charred rug for the limited purpose of determining the cause of the fire which had recently done so much damage to the owner's property.

This piece of charred rug the landlord clearly could and would have removed during the repairs he was required to make under the lease. This was conceded at oral argument in the Connecticut Supreme Court.

This is not a case in which the landlord's right to enter and inspect is being advanced as a smoke screen to justify a landlord's consent to an intrusive search into private areas where the landlord has no interest except a desire to cooperate with the authorities. The landlord here had a strong interest in determining the cause of the fire. It is difficult to see how one could argue that the

owner was not entitled to take whatever reasonable steps were necessary to make that determination. His consent to the entry of those public officials charged with determining the cause of fires would appear to be the most reasonable and appropriate course of action in light of all the circumstances and the lease.

Here, the consenting landlord could be said to have "access to the area searched, and either common authority over it, a substantial interest in it or permission to exercise that access, express or implied" and that validates the search. *United States v. Buettner-Janusch*, 646 F.2d 759, 765 (2d Cir.), *cert. denied*, 454 U.S. 830 (1981).

The landlord-owner's consent was valid in this case.

III.

THE EXCLUSIONARY RULE SHOULD NOT APPLY WHERE THE OFFICERS IN GOOD FAITH RELIED UPON THE LANDLORD'S CONSENT

Inextricably intertwined with the preceeding argument is the question of the applicability of the remedy of suppression where the conduct of the officers was taken in the reasonable good faith belief that it was proper.

In measuring the facts of this case one can only conclude that the officers acted in the reasonable good faith belief that consent had been obtained from the proper party. Mr. Cipriano in fact owned the building. The premises had been gutted by fire and stood open. The owner, not the defendant, had secured the premises after the fire. The owner opened the premises for the fire marshal on the Monday following the fire. Even the defendant's attorney called Mr. Cipriano to gain access to the building.

Where the actions of the law enforcement officer in conducting a search are reasonable, as was the reliance on the owner's consent here, it is submitted that the search is not an "unreasonable" one barred by the fourth amendment.

The drastic effect of the exclusionary rule and the need to more precisely tailor its application have been recently recognized. *See Stone v. Powell*, 428 U. S. 465 (1976); *Brown v. Illinois*, 422 U. S. 590 (1975). A majority of the United States Court of Appeals for the Fifth Circuit, sitting en banc, has specifically recognized an exception to the exclusionary rule where "the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper." *United States v. Williams*, 622 F.2d 830, 847 (5th Cir. 1980). A similar holding is urged upon this Court.

Certainly where a closely divided Connecticut Supreme Court has difficulty deciding the issue of police conduct, no "imperative of judicial integrity" requires suppression of the fruits of the police search. Nor does the need to deter the police from misconduct require such a result when the police were relying in good faith upon the landlord-owner's real and apparent control over the premises. Such an indiscriminate application of the exclusionary rule may generate rather the "disrespect for the law and the administration of justice" which has been growing in this country. *See Stone v. Powell*, 428 U. S. at 491.

Suppression of evidence is an unjust remedy where the officers seized evidence acting with justifiable good faith.

IV.

THE DEFENDANT HAD NO REASONABLE EXPECTATION OF PRIVACY REQUIRING SUPPRESSION OF EVIDENCE

The fourth amendment protects not against all searches but only those which are unreasonable. The test for determining whether fourth amendment rights have been violated is first whether "a person [has] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U. S. 346, 361 (1967) (Harlan, J., concurring).

The Connecticut courts, while professing to ignore the intricacies of property law in determining the issue, in fact applied just those intricacies in concluding that the defendant had a reasonable expectation of privacy. The facts, however, compel a finding that the tenant here had no actual expectation of privacy. As was noted in one dissent from the Connecticut Supreme Court's decision in this case, "[t]he evidence does not reasonably establish that the defendant exhibited any subjective expectation of privacy in the fire damaged restaurant; nor can I conclude that society would recognize any such expectation as reasonable." *State v. Zindros*, 189 Conn. at 260, 456 A.2d at 305 (Spada, J., dissenting) (Appendix A at 29a).

In the instant case, it must be concluded that the defendant had no actual expectation of privacy which was offended by the search. The fire of February 12th destroyed the interior of the restaurant with the entire inside suffering heavy damage and the windows, front door glass and side door being destroyed. Subsequent to the fire the premises were boarded up to protect the premises and keep out children not by the defendant but by Mr. Cipriano, the owner.

The landlord and others thereafter gained entrance to the premises by the use of a hammer or crowbar to remove the boards. The landlord opened up the premises in this way on February 14th for the police and fire marshal. On February 23rd the landlord again opened up the premises for the police, fire marshal and state fire marshal. The tenant entered the premises on occasion after the fire by removing the nailed up boards and replacing them when he left. The landlord had also installed a side door with a lock for which he retained the key since the door had also been destroyed in the fire. On occasion the landlord admitted the tenant's attorney to the premises via this door. (T-16, 19, 20, 23-25, 58-59, 62, 116-17, 128).

It can hardly be argued that here the defendant had a reasonable expectation of privacy as to access to the premises.

As pointed out above, apart from the landlord-owner asserting control of access to the premises, the owner had control over the premises to make the necessary repairs. The interior of the premises after the fire was not fit for use as a restaurant, pizza parlor or any other such use without those repairs. This was the condition of the premises when the fire investigators went there on February 23rd. The landlord was in fact paid the sum of $21,000 for damage to the interior of the building which the landlord claimed was totally destroyed. The tenant's fixtures, consisting of restaurant equipment, were on the premises at the time. The tenant claimed these fixtures were also damaged by the fire to the sum of $6,750, and he left his fixtures on the premises while he attempted to settle with his fire insurance company. (T-112-13, 118-19, 135). (The landlord had asked the tenant for rent for the month of March, but the tenant refused to pay because, the tenant stated, the fire ended the lease. The landlord had told the tenant to remove his fixtures and they were removed during the last week of February.) However, no search or seizure of the defendant-tenant's fixtures was the object of the defendant's motion to suppress granted by the Connecticut courts.

As pointed out previously the owner-landlord could enter along with necessary workmen to make those extensive repairs and in those circumstances it can hardly be said the tenant could reasonably expect any privacy as to the appearance of the interior premises, the fumes upon the interior premises and the removal of the charred wall-to-wall carpeting. No actual or reasonable right of privacy of the tenant was violated by the fire investigators' examination of the premises in these circumstances. After the fire, in view of the lease provision and after the landlord boarded up the premises, it was apparent that the tenant then assumed the risk that the landlord-owner having authority over the premises would permit this limited governmental intrusion "on his own right." *See United States v. Matlock*, 415 U. S. at 171 n.7; *United States v. Buettner-Janusch*, 646 F.2d at 764, 767 n.10.

No actual or reasonable expectation of privacy required the suppression of evidence in this case.

CONCLUSION

For the above reasons the State of Connecticut asks this court to grant a writ of certiorari and review the decision of the Connecticut Supreme Court.

Respectfully submitted,

THE STATE OF CONNECTICUT-PETITIONER

Francis M. McDonald
State's Attorney

Paul E. Murray
Assistant State's Attorney

APPENDIX

APPENDIX

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APPENDIX A

STATE OF CONNECTICUT *v.* GEORGIOS ZINDROS
(10505)

SPEZIALE, C. J., PETERS, HEALEY, SHEA and SPADA, Js.

Argued October 7, 1982—decision released February 15, 1983

Information charging the defendant with the crime of arson in the second degree, brought to the Superior Court in the judicial district of Waterbury, where the court, *Maiocco, J.*, granted the defendant's motion to suppress certain evidence and rendered judgment dismissing the action, from which the state, on the granting of permission, appealed to this court. *No error.*

Paul E. Murray, assistant state's attorney, with whom, on the brief, was *Francis M. McDonald*, state's attorney, for the appellant (state).

Edward G. Fitzpatrick, with whom was *Raymond J. Shepack*, for the appellee (defendant).

ARTHUR H. HEALEY, J. On February 12, 1977, a fire broke out in a building located on Highland Avenue in Waterbury. The building was owned by Louis Cipriano and was under a lease to the defendant for his exclusive use as a pizza restaurant. The premises suffered extensive damages rendering them unfit for occupancy. In an information filed in April, 1977, the defendant was accused of starting this fire and was charged with arson in the second degree in violation of General Statutes § 53a-112.[1]

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1. General Statutes § 53a-112 provides, in part, as follows: "(a) A person is guilty of arson in the second degree when he starts a fire or causes an explosion: (1) With intent to destroy or damage a building, as defined in section 53a-100, (A) of another, or (B) whether his own or another's, to collect insurance for such loss; and (2) such act subjects another person to a substantial risk of bodily injury or another building to a substantial risk of destruction or damage."

On June 21, 1977, the defendant filed a motion to suppress all evidence, and related testimony, obtained in a search of the premises by police and fire officers on February 23, 1977. As the basis for his motion, the defendant claimed that the search was conducted without a warrant and without his consent. After an evidentiary hearing on the matter, the court, *Maiocco, J.*, granted the defendant's motion. Thereafter, the defendant filed a motion to dismiss the information against him with prejudice which was granted by the court, *Henebry, J.*, on November 12, 1980. On the same day, the state filed a request, pursuant to General Statutes § 54-96, for permission to appeal the judgment, which was granted by the court.

To assess the parties' claims properly, it is necessary to delineate certain events that led to the search of the leased premises on February 23, 1977, and to examine the business relationship between the defendant and his landlord, Cipriano, as that relationship was affected by the events occurring between the time of the fire and the search. The defendant was assigned the lease for the premises on April 15, 1976, with a term that ran until October 31, 1978. The defendant was current in his rent through the month of February, 1977. Furthermore, the court found that the lease had not been terminated at the time the officers conducted the warrantless search.

There are four clauses in the lease that are relevant to this appeal. The third clause provides, in part, that "if the leased premises shall be deserted or vacated, the Landlord or its agents shall have the right to and may enter the said premises as the agent of the Tenant." The tenth clause gives the landlord the right to enter the premises at reasonable hours to inspect and to make any necessary repairs on the premises. The eleventh clause deals with the parties' rights in the event the premises were destroyed by fire, explosion or otherwise. It provides as follows: "In the event of the destruction of the demised premises or the building containing the said premises by fire, explosion, the elements or otherwise dur-

ing the term hereby created, or previous thereto, or such partial destruction thereof as to render the premises wholly untenantable or unfit for occupancy, or should the demised premises be so badly injured that the same cannot be repaired within ninety days from the happening of such injury, then and in such case the term hereby created shall, at the option of the Landlord, cease and become null and void from the date of such damage or destruction and the Tenant shall immediately surrender said premises and all the Tenant's interest therein to the Landlord, and shall pay rent only to the time of such surrender, in which event the Landlord may re-enter and re-possess the premises thus discharged from this lease and may remove all parties therefrom. Should the demised premises be rendered untenantable and unfit for occupancy, but yet be repairable within ninety days from the happening of said injury, the Landlord may enter and repair the same with reasonable speed, and the rent shall not accrue after said injury or while repairs are being made, but shall recommence immediately after said repairs shall be completed. But if the premises shall be so slightly injured as not to be rendered untenantable and unfit for occupancy, then the Landlord agrees to repair the same with reasonable promptness and in that case the rent accrued and accruing shall not cease or determine. The Tenant shall immediately notify the Landlord in case of fire or other damage to the premises." Finally, the twenty-fourth clause provides that "[t]he foregoing rights and remedies are not intended to be exclusive but as additional to all the rights and remedies the Landlord would otherwise have by law." The significance of these clauses will be addressed while examining the substantive issues raised by this appeal.

As previously noted, the fire occurred on February 12, 1977. The defendant testified at the hearing on the motion to suppress that he first found out about the fire on Sunday, February 13, 1977, from both the landlord and his own daughter. He did not go into the restaurant on that day, but he did call the fire marshal to make an appointment for the marshal to inspect the premises the following day. Meanwhile, on Sunday, Cipriano had someone secure the

building by boarding it up.[2] He also testified that he had a new door put on the side of the building.[3] In response to a question asking him why he hadn't replaced the door, the defendant stated: "I didn't know that he had put the door and I didn't know whether he wanted to throw me out."

On Monday, February 14, two members of the Waterbury fire marshal's office inspected the premises. There was conflicting testimony as to who let them in;[4] however, it was the defendant who showed them around. Nothing was removed on that day, but the marshals were able to determine the place of origin of the fire.[5] The defendant resecured the premises when they left. The defendant at one point testified that he did not tell them they could not reenter the building because "I can't stop anyone."

The defendant visited the premises on at least two other occasions. Between February 16 and February 18, he met a representative of his insurance company, and on February 22, he met an inspector from the Waterbury health department. The defendant was con-

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2. The defendant and Cipriano gave contradictory testimony at the suppression hearing as to why Cipriano secured the premises. Cipriano testified that he called the defendant on Sunday and requested that he board up the premises. The defendant allegedly responded by saying that he was "out of business." The defendant testified that he was told about the fire by his daughter on Sunday about the same time that Cipriano called him and she stated that the place was already boarded up.

3. There was conflicting testimony as to when this door was put on. Cipriano testified that he had asked one Bushka on February 13 to build it. The defendant testified that it was not built until after February 22. The defendant did testify, however, that it was Cipriano who put on the door.

4. One of the fire marshals testified that Cipriano let them in by prying open the plywood on the front door with a hammer. The defendant testified that he was the person who let them in.

5. Zindros testified that on February 14, 1977, the fire marshal told him where the fire had started inside the premises and that "[h]e [the fire marshal] said that it happened with gasoline."

cerned with the restaurant goods and equipment[6] that remained in the premises. After each visit, the defendant resecured the premises.

The defendant and Cipriano were in the building together on two or three occasions. One of the occasions was when the defendant was with his insurance representative. The defendant asked Cipriano to leave because he was making too much noise. Cipriano thereupon left. On no other occasion did either the defendant or Cipriano ask the other to leave.[7]

No formal action was taken on the part of the defendant or Cipriano to terminate the lease in accordance with its terms in the event of a fire. While the defendant testified that he did not really understand the lease, he felt that the lease was broken by the fire but that he was entitled to stay in the premises until the end of February because his rent was paid. Cipriano, on the other hand, requested that the defendant pay the rent for March.[8] Both Cipriano and the defendant cleaned out the premises. The defendant testified that although he felt that the lease was broken, it was also his responsibility to "repair" the place. He did not, however, take any action to make any substantial repairs because he was waiting for his insurance claim to be settled.

The search which was the basis for the defendant's motion to suppress occurred on February 23, 1977, eleven days after the fire. Officers of the Waterbury police department, the Waterbury fire

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6. One of the state troopers who engaged in the search on February 23 testified that he saw booths, an oven and a refrigerator.

7. Cipriano testified that on several occasions the defendant's attorney called him up and requested to be let into the building. It is unclear, however, whether these requests came before the search on February 23, or after the defendant had been arrested.

8. Cipriano further testified that the defendant had told him he was going out of business. The defendant denied this and said several times that it had always been his intention to reopen the restaurant.

department, and the state police department were granted access to the premises by Cipriano. Neither a search warrant for the premises nor the permission of the defendant was sought by the officers. The police knew the defendant operated the restaurant and considered him to be a suspect. The sole purpose of the entry was to search for and obtain evidence of the arson. Upon granting entry, the officers checked the air for hydrocarbons and removed a small piece of charred carpeting for testing. The rug was installed by Cipriano. In his motion, the defendant sought to suppress the test results on both pieces of evidence, as well as all evidence based upon the search of the premises and seizure of the evidence.

As a result of the fire Cipriano collected $21,000 from his insurance company for damages to the building. At the hearing in January, 1979, the defendant said that he had not collected any money on his insurance claim.[9] Subsequent to the fire, the defendant never reoccupied the premises or reopened the premises. After remaining vacant for seven months, the building was sold by Cipriano.

In making its claim that the trial court erred in granting the motion to suppress, the state essentially argues (1) that the defendant had no reasonable expectation of privacy in the premises searched that was fatally offended by the search, and (2) that the landlord Cipriano clearly had the authority to consent to the entry and the search by the officers whether such authority be denominated actual authority or apparent authority, thus requiring the

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9. He testified that he "didn't get anything" and that "they [his insurance carrier] just returned the money that I paid for the insurance because the year wasn't up. They gave me the balance."

conclusion that the search was "reasonable" under the fourth amendment.[10]

The issue of whether a "search" comes within the protection of the fourth amendment involves a two-fold requirement under *Katz v. United States*, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). The first is whether the person who is the focus of the inquiry has "exhibited an actual (subjective) expectation of privacy and, second . . . [whether] the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, supra, 361. Where it is established the law enforcement officials have encroached upon a defendant's reasonable expectation of privacy, and the trial court explicitly found that this had in fact taken place, then the focus of inquiry should move to the "reasonableness" of the search. That is, where there was a warrant, was it accomplished pursuant to the warrant and where there is no warrant, was it justified and thus constitutional because it was within an exception to the warrant requirement? The state does not disagree that the United States Supreme Court has made it clear that "a search conducted without a warrant issued upon probable cause is *'per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U. S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), quoting *Katz v. United States*, supra, 357; *Coolidge v. New Hampshire*, 403 U. S. 443,

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10 There is no serious question raised of the defendant's standing on the motion to suppress in the sense that the state's brief recognizes that (as the trial court found) if the defendant's reasonable expectation of privacy is sustained, then the issue of the "reasonableness" of the search must be addressed. The United States Supreme Court in reference to "standing" has said: "But we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Rakas v. Illinois*, 439 U.S. 128, 139, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), reh. denied, 439 U.S. 1122, 99 S. Ct. 1035, 5 L. Ed. 2d 83 (1979).

454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564, reh. denied, 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d 120 (1971); see also *Stoner v. California*, 376 U.S. 483, 486, 84 S. Ct. 889, 11 L. Ed. 2d 856, reh. denied, 377 U.S. 940, 84 S. Ct. 1330, 12 L. Ed. 2d 303 (1964); *State v. Tully*, 166 Conn. 126, 133, 348 A.2d 603 (1974); *People v. Adams*, 53 N.Y.2d 1, 7, 422 N.E.2d 537 (1981).

Two recognized exceptions to the warrant requirement are where searches have been undertaken pursuant to (1) "exigent circumstances";[11] see, e.g., *Mincey v. Arizona*, 437 U.S. 385, 392-94, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); *Terry v. Ohio*, 392 U.S. 1, 25-26, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Runkles*, 174 Conn. 405, 412, 389 A.2d 730, cert. denied, 439 U.S. 859, 99 S. Ct. 177, 58 L. Ed. 2d 168 (1978); and (2) consent. See, e.g., *Davis v. United States*, 328 U.S. 582, 593-94, 66 S. Ct. 1256, 90 L. Ed. 1453, reh. denied, 329 U.S. 824, 67 S. Ct. 107, 91 L. Ed. 700 (1946); *Dotson v. Warden*, 175 Conn. 614, 618, 402 A.2d 790 (1978). The exceptions "have been jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 (1958); see *State v. Krause*, 163 Conn. 76, 80, 301 A.2d 234 (1972). The burden of proof is upon the state to show that an exception exists. *Coolidge v. New Hampshire*, supra, 455; see *McDonald v. United States*, 335 U.S. 451, 456, 69 S. Ct. 191, 98 L. Ed. 153 (1948); *People v. Reed*, 393 Mich. 342, 362, 224 N.W.2d 867, cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975); *Dotson v. Warden*, supra, 618. The Connecticut and United States constitutions "equally and conjointly prohibit unreasonable warrantless searches of private property. U.S. Const. amends. IV and XIV, § 1, Conn. Const. art. I, § 7." *Dotson v. Warden*, supra.

Before we analyze the issues raised by this appeal, it should be recognized that our power to upset the findings of the trial court

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11. In oral argument before us, the state expressly disclaimed that it was relying upon the "exigent circumstances" exception.

is limited. We have stated our function here on many occasions. "On appeal, it is the function of this court to determine whether the decision of the trial court is clearly erroneous. See Practice Book, 1978, § 3060D. This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. That is the standard and scope of this court's judicial review of decisions of the trial court. Beyond that, we will not go." *Pandolphe's Auto Parts, Inc. v. Manchester*, 181 Conn. 217, 221-22, 435 A.2d 24 (1980).

The appropriate starting point for fourth amendment analysis here is, thus, the defendant's reasonable expectation of privacy. *Katz* recognized the importance of the individual's expectations of privacy when it explained: "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations omitted.] But what he seeks to preserve as private even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, supra, 351-52. The requisites for judicial recognition of a reasonable expectation of privacy that are to be given fourth amendment protection are (1) that the person involved exhibit an actual (subjective) expectation of privacy, and (2) that the expectation was one to be recognized (by society) as "reasonable." *Katz v. United States*, supra, 361. A reasonable expectation of privacy is one that is "legitimate." See *Raskas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), reh. denied, 439 U. S. 1122, 99 S. Ct. 1035, 59 L. Ed. 2d 83 (1979); see also *United States v. Salvucci*, 448 U. S. 83, 91-92, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980). *Rakas* also held that an illegal search only violates the rights of

those who have "a legitimate expectation of privacy *in the invaded place.*" (Emphasis added.) *Rakas v. Illinois*, supra, 143. A person, of course, can have a legally sufficient interest in a place other than his own home so that the fourth amendment protects him from unreasonable governmental intrusion into that place. *Jones v. United States*, 362 U. S. 257, 263, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960); see *Rakas v. Illinois, supra*, 142-43. This also applies to commercial premises. See *Marshall v. Barlow's, Inc.*, 436 U. S. 307, 311-13, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978); *Camara v. Municipal Court*, 387 U. S. 523, 534, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

The determination of whether a person has exhibited a subjective expectation of privacy requires a detached evaluation of the facts and circumstances of the particular case. See *United States v. Brock*, 667 F.2d 1311, 1320 n.8 (9th Cir. 1982); *United States v. Sledge*, 650 F.2d 1075, 1077 (9th Cir. 1981). As we have indicated, the trial court was presented with conflicting evidence at the hearing on the motion to suppress. It is the function of the trier to determine the credibility of witnesses and the weight to be given their testimony. *State v. Rucker*, 177 Conn. 370, 378, 418 A.2d 55 (1979); *State v.Chisolm*, 162 Conn. 631, 632, 295 A.2d 563 (1972). There was ample evidence to support the trial court's determination that the defendant had a reasonable expectation of privacy "in the burned out and boarded up building" as of February 23, 1977. The court properly found, on this issue as well as on that of consent, that the defendant had not abandoned[12] the leased premises. "Abandonment is a question of fact. . . . It implies a voluntary and intentional renunciation, but the intent may be inferred as a fact from the surrounding circumstances. . . ." *Pizzuto v. Newington*, 174 Conn. 282, 285, 386 A.2d 238 (1978). On those occasions, between February 14 and February 23, when the defendant left the premises he secured them. He not only said that it was his intention to stay, but he always secured

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12. See article third of the lease set out above.

the site upon leaving because "I had my merchandise in there." The defendant said that he had damaged personal property inside this building which he claimed was worth approximately $6750. He said he was keeping the premises because he intended to reopen the business and he wanted to "fix it so I could work." No formal action was taken by either the defendant or the landlord to terminate the lease according to its terms in the event of a fire. The landlord did not ask him to leave and turn the premises over to him. His rent was paid through the end of February and so he felt he had the right to remain there until at least that time "because of my rent paid." He answered "yes" to the question: "Was it your intention to keep people out of the premises unless they were there with your permission?[13] There was thus evidence before the court that, if believed, actually demonstrated the defendant's subjective expectation of privacy.[14]

Inasmuch as the trial court found that the defendant had a reasonable expectation of privacy, it follows that it also found that such an expectation in this case was one that "society is prepared to recognize as 'reasonable' " under *Katz* and its progeny.[15]

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13. The court also specifically found that the bare statement attributed to the defendant after the fire that he was " 'out of business' certainly cannot be stretched to indicate an intent on his part to abandon the premises with all his valuable equipment still in it."

14. Judge Spada's dissent recites a number of factual circumstances advanced purportedly to attack the conclusion that the defendant had a cognizable subjective expectation of privacy. These emphasize certain conduct of the landlord. Such analysis is inappropriate here because a determination of a defendant's subjective expectation of privacy focuses the examination on the defendant's acts and beliefs—not those of the landlord, Cipriano. See *Stoner v. California*, 376 U.S. 483, 489, 84 S. Ct. 889, 11 L. Ed. 2d 856, reh. denied, 377 U.S. 940, 84 S. Ct. 1330, 12 L. Ed. 2d 303 (1964).

15. Judge Spada's dissent concludes that the expectation of privacy we conclude the defendant had is not one which society would recognize as reasonable, citing *United States v. Bellina*, 665 F.2d 1335, 1340 (4th

We agree that the court could legitimately conclude that this expectation was reasonable under the circumstances of this case. The court's determination that the defendant had the requisite expectation of privacy is not clearly erroneous and must stand. See *State v. Ostroski*, 186 Conn. 287, 294, 440 A.2d 984 (1982); *Pandolphe's Auto Parts, Inc. v. Manchester*, supra, 221-22; Practice Book § 3060D.

We turn now to the state's claim that the court erred in finding that the defendant's landlord, Cipriano, did not have the right to consent to the warrantless search of the leased premises. "In *Schneckloth v. Bustamonte*, 412 U.S. 218 [93 S. Ct. 2041, 36 L. Ed. 2d 854] (1973), the Court reaffirmed the principle that the search of property,without warrant and without probable cause, but with proper consent voluntarily given, is valid under the Fourth Amendment." *United States v. Matlock*, 415 U.S. 164, 165-66, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). The general rule of law is that a landlord may not consent to a search of the tenant's premises and this is true even where the landlord has some

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Cir. 1981). He also cites *United States v. Rucinski*, 658 F.2d 741, 746 (10th Cir. 1981), cert. denied, U.S. , 102 S. Ct. 1430, L. Ed. 2d (1982), for the proposition that private houses and commercial property are distinguishable in terms of the protection afforded by the fourth amendment.

We point out that *Bellina* involved the search of an *airplane* and the court noted the significance of that factor in stating that the "rule of a limited or diminished expectation of privacy that exists in connection with automobiles has been consistently held to attach to airplanes." *United States v. Bellina*, supra, 1341. In *Bellina* the court was not at all concerned with the reasonableness of one's privacy rights in commercial premises.

We do not quarrel with the proposition that, in certain circumstances the United States Supreme Court has held that administrative inspections of commercial premises do not require the full protection of a search warrant. *Rucinski* involved a search of the defendant's lumber mill premises from a distance by federal agents using cameras and a telescope to ascertain whether the defendant was manipulating the

right to enter for purposes of inspecting and cleaning. *Chapman v. United States*, 365 U. S. 610, 616-17, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961). Professor LaFave, in stating that the general rule is that a lessor cannot give consent to a warrantless search of the premises occupied by his tenant, says: "The rule is not otherwise merely because the lessor has by express agreement or by implication reserved the right to enter for some special and limited purpose." 2 LaFave, Search and Seizure § 8.5(a), p. 739.[16] The

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quality of logs he cut from government property under a contract in which he had already agreed to unannounced inspections. In holding that the defendant had no reasonable expectation of privacy in the mill yard of his lumber company which was surrounded by nothing more than a barbed wire fence, the court said that barbed wire fence "could scarcely be compared with those situations in which dwellings and structures occupied by persons having the expectation of privacy are protected from surveillance." *United States v. Rucinski*, supra, 746.

In *Rucinski*, the court relied upon the case of *Donovan v. Dewey*, 452 U.S. 594, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981). In summarizing the law in this area the *Donovan* court said: "These decisions make clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey*, supra, 600. The search of Zindros' commercial premises was hardly an inspection made pursuant to a regulatory scheme as it was in *Donovan* (federal inspection of a quarry concerning correction of 25 violations under the Federal Mine Safety and Health Act of 1977), but a search for evidence of a crime. Zindros' expectation of privacy, therefore, was such that society would recognize it as reasonable.

16. We recognize that an exception occurs if the tenant has abandoned his interest in the leased premises or if the lease has terminated by means other than abandonment. See, e.g., *Feguer v. United States*, 302 F.2d 214, 249 (8th Cir.), cert. denied, 371 U.S. 872, 83 S. Ct. 123, 9 L. Ed. 2d 110 (1962). Our determination on the expectation of privacy issue that the trial court correctly determined that the defendant did not abandon the leased premises is the same on the issue of consent.

state has the burden of proof on the issue of consent and that burden is not discharged by showing no more than acquiescence to a claim of lawful authority. *Bumper v. North Carolina*, 391 U. S. 543, 548-49, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); see *United States v. Mendenhall*, 446 U. S. 544, 557, 100 S. Ct. 1870, 64 L. Ed. 2d 497, reh. denied, 448 U. S. 908, 100 S. Ct. 3051, 65 L. Ed. 2d 1138 (1980). Consent is a question of fact to be evaluated under the totality of all the circumstances. *Schneckloth v. Bustamonte*, supra, 227; *Dotson v. Warden*, supra, 619. As a question of fact, it is to be decided by the trial court on the evidence it deems credible together with the reasonable inferences to be drawn from that evidence and its conclusions will stand unless they are clearly erroneous. *Dotson v. Warden*, supra, 619.

The state recognizes that if it is found that the defendant had a reasonable expectation of privacy, it must prove that the consenting party "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."[17] *United States v. Matlock*, supra, 171; *Dotson v. Warden*, supra, 621. The state maintains in its brief that, by operation of the lease and the fact of the fire, the landlord had "a right to possession *superior* to that of the lessee." This claim goes as follows: construing the facts most favorably to the defendant the premises were untenantable but repairable within ninety days thereby implicating

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17. The search conducted by the police of the leased premises was hardly one of "inspection"; see *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311-13, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); but was, as the court specifically found, "for the sole purpose of searching for and obtaining evidence of arson."

that portion of the lease (article eleventh)[18] which provides: "[T]he Landlord may enter and repair the same with reasonable speed, and the rent shall not accrue after said injury or while repairs are being made, but shall recommence immediately after said repairs shall be completed." The state's claim continues, arguing that "obviously" the defendant was no longer in "exclusive possession"[19] after the fire and he was not required to pay rent. Under the lease, the landlord was given, it continues, "an absolute right to temporary possession to perform certain activities" such as "the necessity to gut the premises to make necessary repairs . . . [the] need to bring in workmen, subcontractors, etc. . . . ." Asserting that the "landlord's interest and peculiar relationship with the object of the search was obvious and unique," the state submits that this was not a "general exploration of the premises" of a tenant such as is generally condemned; but rather it was for an air sample and the removal of charred rug for the "limited purpose of determining the cause of the fire which had recently done so much damage to his property." Therefore, the state contends that "[h]is consent to the entry of those public officials charged with deter-

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18. Article eleventh of the written lease provided in part: "Should the demised premises be rendered untenantable and unfit for occupancy, but yet repairable within ninety days from the happening of said injury, the Landlord may enter and repair the same with reasonable speed, and the rent shall not accrue after said injury or while repairs are being made, but shall recommence immediately after said repairs shall be completed . . . ." In its memorandum of decision the trial court made no express finding of untenantability under the lease nor did it find that the landlord's entry on February 23, 1977, was made for repair. The court's memorandum contains no finding that the defendant entered the premises after the fire for the purpose of repairing them under the lease. Moreover, the court explicitly found that the landlord asked for a full month's rent for March, 1977, from the defendant.

19. The State does not point to any provision in the lease that mentions "exclusive possession" eo nomine nor do we find any.

mining the cause of fires would appear to be the most reasonable and appropriate course of action in light of all the circumstances and the leases."[20]

The defendant argues that this warrantless search of his non-abandoned leased business premises eleven days after the fire was extinguished violates his fourth amendment protection against unreasonable searches and seizures. He also argues that this search, which was for evidence of a crime, does not fall within any exception to the warrant requirement of the fourth amendment and especially that recognized where a proper third party may give a valid consent to search.

"While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated . . . property rights are neither the beginning nor the end of [this court's] inquiry." *United States v. Salvucci*, 448 U. S. 83, 91, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980). "The test applicable to third-party consent requires the state to prove that the consenting party 'possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.' *United States v. Matlock*, 415 U. S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). *Matlock* (p. 171) goes on to elaborate in a footnote on what constitutes 'common authority.'

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20. The state refers to *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978), decided by the United States Supreme Court after the fire of February 14, 1977. In *Tyler*, that court held, inter alia, that once having entered a building to extinguish a blaze, officials can remain therein for a reasonable time in order to investigate the cause of the fire. "Therefore, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches." (Citations omitted.) *Michigan v. Tyler*, supra, 511-12. The fact that *Tyler* was decided after the fire in this appeal is not critical on this appeal. The intrusion complained of was by governmental officials, both police and fire, searching for evidence of a crime. The fourth amendment applies fully just as if *Michigan v. Tyler* had not been decided.

'Common authority is, of course, *not to be implied from the mere property interest a third party has in the property.* The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements,[21] see *Chapman v. United States*, 365 U. S. 610 [81 S. Ct. 776, 5 L. Ed. 2d 828] (1961) (landlord could not validly consent to the search of a house he had rented to a another), *Stoner v. California*, 376 U. S. 483 [84 S. Ct. 889, 11 L. Ed. 2d 856, reh. denied, 377 U. S. 940, 84 S. Ct. 1330, 12 L. Ed. 2d 303] (1964) (night hotel clerk could not validly consent to a search of customer's room) but rests rather on *mutual use of the property* by persons generally having *joint access or control for most purposes*, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.' " (Emphasis in original.) *Dotson v. Warden*, supra, 622. Adopting a functional approach to this fourth amendment issue, the consent exception reflects a fair accommodation between constitutional requirements and the encouragement of effective law enforcement with the resolution to be made under the facts and circumstances of each case.

To begin with, the landlord clearly did not, as the state asserts, have, under the facts and the lease, a "superior" right of possession.[22] The trial court made no finding that the premises were untenantable and repairable within or without a ninety day period.[23] The landlord did not repair the premises within ninety

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21. For this reason, the reliance merely upon the provisions in the lease in the dissenting opinion is misplaced. It is the *use* of the property that is controlling, not the potential right to use.

22. The analysis in the state's brief on the consent issue draws on what it argues were the landlord's rights under the lease.

23. The closest thing to such an assertion is the court's statement that "[t]he premises suffering extensive damages rendering them unfit for occupancy." The court did not, however, relate it to the provision upon which the state relies here.

days. The defendant and he both cleaned them. Although the rent was paid through February, the landlord, in contradiction to the lease provision upon which the state relies, not only demanded the rent for March but never pursued his option to "repair" by February 23. The landlord never asked the defendant to surrender the premises. Thus, in the circumstances of this case in ending the lease, the landlord's right to possession was hardly "superior" to that of the defendant.

A fair reading of the trial court's memorandum discloses that it concluded that the landlord's consent on either the "common authority" or "other sufficient relationship" criteria of *Matlock* had not been proven by the state. We agree. The landlord took no action to terminate the defendant's possession under the lease; he permitted the defendant's property to remain and demanded another month's rent. He did not demonstrate that he curtailed the defendant's access; he even left the leased premises upon the defendant's asking him to do so several days prior to February 23.[24] It is true that the landlord caused the premises to be boarded up initially and entered the premises on several occasions after the fire. There was, however, no evidence that he exercised his "absolute right to temporary possession" as the state suggests concerning "the necessity to gut the premises to make necessary repairs and the corollary need to bring in workmen, sub-contractors, etc . . . ."[25] The defendant had not abandoned his possession. In addition, the court properly found that any right to inspect under the lease[26]

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24. Zindros testified that this occurred when he (Zindros) and his insurance agent were on the premises concerning a settlement at which time the landlord was making "a little disturbance"; "He [the landlord] was hollering. He was asking for the March rent." The defendant also said that at that time the landlord was not there cleaning the premises nor was he doing any work there.

25. See articles tenth, eleventh, and twenty-fourth of the lease, set out above.

26. See article tenth of the lease, set out above.

could not be enlarged here to authorize consent to officers to enter to gather evidence of a crime by the defendant. 2 LaFave, Search and Seizure § 8.5(a), p. 739; see *Chapman v. United States*, supra, 616; *State v. Hodges*, 287 N.W.2d 413 (Minn. 1980).[27]

The defendant was not contacted concerning giving any consent to this search. He lived in Waterbury and the police and fire officials involved knew he was there. He had not fled nor is it claimed he was likely to do so and this was eleven days after the fire. See *Chapman v. United States*, supra, 615. Only one day prior to the search, the landlord had seen the defendant when the latter had brought a check for property taxes to the landlord's home. The landlord knew his consent was not for a mere civil or administrative search but for evidence of a crime; he said "they wanted to take evidence." It is true that a "co-owner" has been said to have the authority to permit the search of a jointly held possession. *Frazier v. Cupp*, 394 U. S. 731, 740, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969); *Jackson v. Official Representatives & Employees of Los Angeles Police Department*, 487 F.2d 885, 886

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27. Judge Spada's dissent points out that "[u]nder the lease, the landlord reserved to himself the right of access and entry upon the occurrence of a major fire." If we assume, arguendo, as he says, that "[t]his reservation was broad enough to allow for appraisal of damage; the opportunity to repair and relet; and finally to locate and abate a suspected cause of the fire," such rights cannot be the basis for extending authority to the landlord to authorize a warrantless search of the premises by the police for criminal evidence in this case. This proposition was rejected in *Chapman v. United States*, 365 U.S. 610, 616, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961), which Judge Spada endeavors to distinguish by stating that there was no relevant lease provision in *Chapman*. No basis exists for such a distinction. The premise for the holding in *Chapman* was that property law should not control protections afforded by the fourth amendment. Similarly, contract law cannot be utilized here to control the defendant's constitutional rights. To conclude otherwise would cause Zindros' fourth amendment rights to be subject to, at the very least, the loosely fettered discretion of his landlord.

(9th Cir. 1973). This case, however, is not one of co-ownership. Nor is it one of joint or mutual use of that quality that pushes fourth amendment protections into the exception of consent.[28]

The state next argues that even if the landlord had no actual authority to consent, the search was still reasonable under the fourth amendment because there was "apparent authority" for the search. It goes on to claim that, in measuring the facts of this case against the apparent authority doctrine, one must conclude that the

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28. The dissenting opinion by Justice Shea asserts that this case is similar to *United States v. Botsch*, 365 F.2d 542 (2nd Cir. 1966). The court in that case, however, acknowledged that it was distinguishable from landlord consent cases because the landlord's "activities—though innocent—were inextricably intertwined with Botsch's alleged scheme and cast suspicion upon him . . . ." Id., 548. Courts that have cited the *Botsch* case have consistently noted this distinction. See *United States v. Diggs*, 544 F.2d 116, 120 (3rd Cir. 1976) (the "right to exculpate oneself decisively distinguished [Botsch] from [the searches] condemned in the so-called 'hotel cases'"); *United States v. Gargiso*, 456 F.2d 584, 587 (2nd Cir. 1972) ("Here, as in *Botsch*, and unlike in *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 [reh. denied, 377 U.S. 940, 84 S. Ct. 1330, 12 L. Ed. 2d 303] (1964), ... the landlord—with access to and interest in an area . . . has a right quickly to exculpate himself from suspicion."); *United States v. Cataldo*, 433 F.2d 38, 40n (2nd Cir. 1970), cert. denied, 401 U.S. 977, 91 S. Ct. 1200, 28 L. Ed. 2d 326 (1971); *United States v. Poindexter*, 325 F. Sup. 786, 791 (S.D. N.Y. 1971); *Gieffels v. State*, 590 P.2d 55, 61 (Ala. 1979); *Commonwealth v. Latshaw*, 481 Pa. 298, 308n, 392 A.2d 1301 (1978), cert. denied, 441 U.S. 931, 99 S. Ct. 2050, 60 L. Ed. 2d 659 (1979). Here, unlike in *Botsch*, we have noted that it was the defendant who was a suspect at the time that Cipriano consented to the entry. There was no testimony that Cipriano consented to the entry on the basis of trying to exculpate himself from suspicion. Therefore, the *Botsch* case is inapplicable to the facts in the present case.

officers acted in the "reasonable and good faith belief" that consent had been obtained from the proper party.[29]

The defendant claims that the record does not contain facts sufficient to justify the search on the doctrine of "apparent authority" which, in turn, would be necessary to support the state's claim that the officers' action based on that authority establishes a reasonable good faith belief by them that validates the search.

In pressing its line of argument the state points to the following circumstances: Cipriano owned the building, the premises had been "gutted" by fire, he (and not the defendant) had secured the premises after the fire and he opened the premises for the fire marshal on the Monday after the fire. It also claims that the defendant's attorney called the landlord to gain access to the building.[30] The defendant argues that the police were not at all mistaken as to the essential facts. They knew that Cipriano owned the premises but that it was currently occupied by the defendant. Detective Lieutenant Solomita was one of the two officers dispatched to Cipriano's home to seek his consent to enter the premises; Solomita lived in the area of the defendant's pizza business and had even been a patron there prior to the fire.[31] At that time Solomita

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29. We note that the trial court's memorandum of decision does not address either the claim of "apparent authority" or "reasonable good faith belief," although the parties briefed and argued both issues in this court. The defendant has not claimed that these issues were not raised in the trial court.

30. The evidence was conflicting as to when this occurred with reference to the date of the search; in any event, the court made no finding on this circumstance. The state points to no evidence that this was known to the officers before their February 23 entry so as to contribute to the interrelated claim of "apparent authority" and "reasonable good faith belief."

31. Solomita testified that he and Detective Gary went to Cipriano's home for this purpose. Gary, who was among the officers who entered the premises on February 23, did not testify at the hearing on the motion to suppress.

knew the defendant was a suspect. When they entered for the search, after Cipriano pried off the plywood on the front door, the defendant's equipment was still there; they initially saw it there eleven days earlier when police and fire officials were there with the defendant as well as Cipriano. He stresses the lack of exigent circumstances stating that the fire had long since been extinguished.

In *Stoner*, the United States Supreme Court said that "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency by unrealistic doctrines of 'apparent authority.'" *Stoner v. California*, supra, 488. Some courts have refused to suppress evidence obtained as the result of a reasonable good faith belief that permission was given by one with the actual authority to consent to a search. See *People v. Adams*, 53 N.Y.2d 1, 8-9, 422 N.E.2d 537 (1981), and cases there cited. The rationale for this approach has been said to derive from the fact that the fourth amendment protects against unreasonable searches and seizures and, therefore, "if the police are acting in a reasonable fashion in response to the circumstances with which they are confronted, then an error in judgment in failing to ascertain the actual authority of the person to consent should not give rise to an unreasonable search." *People v. Adams*, supra, 9. It is true that implicated in this rationale is the purpose of the exclusionary rule. That rule was designed "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures" and not primarily to vindicate the individual's constitutional right. *United States v. Calandra*, 414 U. S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974); *People v. Adams*, supra, 9. We do not dispute, assuming we adhered to the rule the state urges us to adopt, the view that application of the exclusionary rule in a case where there existed reasonable good faith reliance by the police would do little in discouraging improper police conduct. We deem relevant, at this point, the following language from *Adams*: "We emphasize that the police belief must be reasonable, based upon an objective view of the circumstances present and not upon the subjective

good faith of the searching officers. Moreover, a warrantless search will not be justified merely upon a bald assertion by the consenting party that they possess the requisite authority. Nor may the police proceed without making some inquiry into the actual state of authority when they are faced with a situation with would cause a reasonable person to question the consenting party's power or control over the premises or property to be inspected. In such instances, bare reliance on the third party's authority to consent would not be reasonable and would, therefore, subject any such search to the strictures of the exclusionary rule." *People v. Adams*, supra, 9-10, see *People v. Wagner*, 114 Mich. App. 541, 548-49, 320 N.W.2d 251 (1982). If we apply these principles to this case, the trial court could have reasonably concluded that the officers did not demonstrate the necessary reasonable good faith belief under the circumstances. Therefore, we need not decide whether such an exception to the exclusionary rule exists.[32] The

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32. The state urges us to adopt the view of *United States v. Williams*, 622 F.2d 830, 847 (5th Cir. 1980), cert. denied, 449 U.S. 1127, 101 S. Ct. 946, 67 L. Ed. 2d 114 (1981), and to adopt such an exception. In *United States v. Williams*, supra, the arresting drug enforcement agent recognized "with certainty" that the defendant was in violation of her bail limitations under the statute imposing travel restrictions upon her. 18 U.S.C. § 3146. That court, deciding that the agent acted on the good faith belief that the defendant's conduct was in violation of statute, found that suppression of heroin found in an incidental search was not required whether or not her violation of the bond limitation warranted her arrest and consequent searches. In applying the good faith exception in *Williams* that court said: "A good-faith mistake about the legal intricacies of bail jumping would not require exclusion of that heroin found in an incidental search." *United States v. Williams*, supra, 846.

Adverting to *Williams*, the state claims that the good faith of the officers in this case must be evaluated "in light of apparently valid provisions of the General Statutes authorizing entry of the type made here. Conn. Gen. Statutes Secs. 29-49 and 29-52." Once again we note that the trial court did not address this claim and yet, on the record

state does not claim that there was no evidence upon which the trial court could base the decision it reached, but rather that the result was erroneous under the applicable law. It is correct that the evidence was often in conflict and, arguably, the decision was a close judgment call, but credibility is still the province of the trier. Assuming arguendo that probable cause existed for the issuance of a warrant on February 13, as the state argued before us, we must observe that courts have strongly supported the preference to be accorded searches under a warrant and have explicated that a doubtful or marginal case with a warrant may be sustainable where one without it would fail. See, e.g., *United States v. Ven-*

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before us, no motion to rectify was made by the state; Practice Book § 3082; and we note that the defendant has not briefed or argued this claim although the state has.

General Statutes § 29-49, as it was on February 23, 1977, provided that "the local fire marshal shall, within two days, not including Sunday, of the occurrence of any fire within his jurisdiction . . . investigate the cause, origin and circumstances of such fire, and especially investigate whether such fire was the result of carelessness, design or any criminal act, and for the purpose of such investigation may enter into and upon the premises where the fire occurred . . . and examine the same . . . ." If we assume that the entry on February 13, 1977, was pursuant to this statute, it is hardly any justification for the entry on February 23, 1977— a lapse of eleven days during which the record discloses no meaningful pursuit of that investigation in the interval.

General Statutes § 29-52, it appears, requires periodic inspections and permits entry for the same. It also provides for entry in an emergency. No serious claim can be made that the entry of February 23, 1977, was an "inspection" pursuant to this statute or that it was pursuant to an emergency—which latter circumstance has been expressly disclaimed by the state.

Therefore, we need not even decide whether such an exception should exist in this jurisdiction because we have already decided that the belief of the officers that the search was proper was unreasonable under the circumstances. See *Riley v. Gray*, 674 F.2d 522, 528-29 (6th Cir. 1982).

tresca, 380 U. S. 102, 106, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965); *Jones v. United States*, 362 U. S. 257, 270, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960); *State v. Bember*, 183 Conn. (42 CLJ 41, pp. 7, 13) 439 A.2d 387 (1981); *State v. Jackson*, 162 Conn. 440, 445, 294 A.2d 517, cert. denied, 409 U. S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 121 (1972). One of the purposes of the warrant requirement "is to prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." *United States v. Martinez-Fuerte*, 428 U. S. 543, 565, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976). Just as a search cannot be justified by the potent evidence it produces, so also an unlawful search cannot be justified by claiming that the evidence seized might have been obtained by other and lawful means. *United States v. Mancusi*, 379 F.2d 897, 903 n.9 (2nd Cir. 1967), aff'd sub nom. *Mancusi v. DeForte*, 392 U. S. 364, 88 S. Ct. 2120, 20 L. Ed. 2d 1154 (1968). The state has not shown, as it must, that the trial court's conclusions in this case were "clearly erroneous." See *State v. Ostroski*, supra; *Pandolphe's Auto Parts, Inc. v. Manchester*, supra; Practice Book § 3060D. It follows from what we have said that this search and seizure was "unreasonable" under the fourth amendment.

There is no error.

In this opinion SPEZIALE, C. J., and PETERS, J., concurred.

SHEA, J. (dissenting). In my view the majority opinion constitutes a wholly unwarranted and unprecedented application of the fourth amendment which serves as a kind of reductio ad absurdum to denigrate its salutary purpose. The opinion completely overlooks the legitimate interest of a landlord, whose building has been the subject of a suspected arson, in enlisting the aid of the police for the purpose of determining the cause of the conflagration, despite unambiguous lease provisions providing him a right of access in such an event.

Under the terms of the lease the landlord had a general right to enter the premises in order to inspect them and also to make necessary repairs. He also had a more specific right to enter and

repair in the event of a fire. These provisions must be construed to authorize the landlord to inspect the premises for the purpose of ascertaining the cause of a fire before proceeding to repair the damage caused by the fire. Whether the suspected cause was defective wiring or arson by the tenant, the landlord would have a sufficient interest in the protection of his property to justify an investigation for the purposes of determining the origin of the fire. Since the landlord had such a right to enter in order to find out the cause of the fire, he could authorize others, including the police, to do the same thing. If the tenant could not stop the landlord from making such an investigation, he had no right to object to the same investigation when it was conducted by the police under authority from the landlord.

The difference between this case and the cases involving permission of the owner to enter a hotel room or other premises occupied by another is that here the owner had an interest based upon his status as a landlord in determining the cause of the fire and a right of entry reserved in the lease broad enough to entitle him to do so. These circumstances negate any reasonable expectation of privacy on the part of the tenant.

The case is similar to *United States v. Botsch*, 364 F.2d 542 (2d Cir. 1966), where a landlord, who had been an unwitting accomplice in a fraudulent scheme utilizing the mails, invited postal inspectors to search a shanty which he had leased to the defendant. It was held that his interest in clearing himself from the taint of suspicion, which had been cast upon him because of his innocent participation in the cunning swindle concocted by the defendant, authorized him to allow the search. Id., 547-48. Here also the landlord had a legitimate interest in ascertaining the cause of the fire and, in addition, an express right of entry broad enough to authorize him to make an investigation for that purpose. Since the search conducted by the police did not exceed the scope of the authority vested in the landlord who had consented thereto, it was not unreasonable and did not violate the rights of the defendant under the fourth amendment.

SPADA, J. (dissenting). I must respectfully disagree with the majority decision.

This is an appeal from a suppression order by the trial court invalidating, on constitutional grounds, the warrantless search of a fire-damaged building under lease to the defendant for his use as a restaurant.

The facts on appeal raise two issues: (1) whether the landlord, as a third party, had authority to consent to a police search of the building after the fire, and (2) whether the defendant's legitimate expectation of privacy was violated by the challenged search.

The threshold question in every suppression case is the existence of a reasonable expectation of privacy in the area searched. "[The] capacity [of a defendant] to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U. S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387, reh. denied, 439 U. S. 1122, 99 S. Ct. 1035, 59 L. Ed. 2d 83 (1978). The test for legitimate expectation of privacy is: (a) has there been a subjective expectation exhibited; and (b) is the expectation one society will recognize as reasonable. *Smith v. Maryland*, 442 U. S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

The lease (paragraph 11) provided in relevant part that "[s]hould the demised premises be rendered untenantable and unfit for occupancy . . . the Landlord may enter and repair the same with reasonable speed . . . ." It was undisputed that as a consequence of the February 12, 1977 fire, the premises were rendered unfit for occupancy.

On February 13, the landlord secured the premises by boarding them, thereby protecting both his and the defendant's proprietary interests. A new door, required for access, was installed by the landlord. On February 14, the defendant permitted officials of the Waterbury fire marshal's office to inspect the premises. On three separate occasions after the fire the landlord entered upon the premises for his own purposes.

The defendant testified that he assumed the lease was terminated by the fire but that he could stay to the end of February because his monthly rent had been paid. Both the landlord and the defendant removed debris and cleaned the premises. The defendant made no repairs and eventually removed his salvageable restaurant fixtures. The claimed tainted search occurred on February 23, eleven days after the fire, when the landlord granted access to fire and police officials to search the premises, without a warrant, to ascertain the cause of the fire.

We are not reviewing herein the case of a landlord authorizing a search of his tenant's property. *Chapman v. United States*, 365 U. S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961). Under the lease, the landlord reserved to himself the right of access and entry upon the occurrence of a major fire. This reservation was broad enough to allow for appraisal of damage; the opportunity to repair and relet the premises; and finally to locate and abate a suspected cause of the fire. The early payment of the February rent neither altered nor reduced the landlord's contractual right to enter upon the premises. The majority decision limits the landlord's right of access to the time of the fire or within a reasonable period thereafter. No authority or precedent exists to justify the restriction of the landlord's contractual right of access.

In *Michigan v. Tyler*, 436 U. S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978), cited by the majority, the warrantless search resulted after a fire without the intervention or presence of a landlord or third party. This precedent therefore is unpersuasive in an instance of third party consent, such as in the case before us.

The exigency of the fire triggered the landlord's right of access bargained for and contained in the lease. The landlord's right of unrestricted access effectively negated the defendant's reasonable expectation of privacy. Because the landlord's claim to possession was at minimum equal to that of the defendant, he had an independent right to permit the search.

The burden rests on one who seeks to suppress to prove that his legitimate expectation of privacy has been violated by the

challenged search. *United States v. Bellina*, 665 F.2d 1335 (4th Cir. 1981). The evidence does not reasonably establish that the defendant exhibited any subjective expectation of privacy in the fire damaged restaurant; nor can I conclude that society would recognize any such expectation as reasonable. "Not all places enjoy, in the eyes of society and the law, the same legitimate or reasonable expectation of privacy." *United States v. Bellina*, supra, 1340; see also *United States v. Rucinski*, 658 F.2d 741, 746 (10th Cir. 1981), cert. denied, U. S. , 102 S. Ct. 1430, L. Ed. 2d (1982), making a distinction between private houses and commercial property for fourth amendment purposes.

I would reverse the trial court's ruling on the motion to suppress.

APPENDIX B

No. 12,961

STATE OF CONNECTICUT : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF WATERBURY

GEORGIOS ZINDROS : JULY 16, 1979

MEMORANDUM OF DECISION RE MOTION TO SUPPRESS

The defendant has moved to suppress certain evidence obtained by the authorities in connection with an arson investigation of property at 812 Highland Avenue, Waterbury, Connecticut.

A fire occurred on Saturday, February 12, 1977, at approximately 5:30 p.m. at a pizza restaurant located at the above address. The premises suffered extensive damages rendering them unfit for occupancy.

The building housing the pizza restaurant was owned by Mr. Louis Cipriano and the restaurant portion leased to the defendant Georgios Zindros. The lease was entered by agreement as State's Exhibit A. The rental payments were current through the month of February, 1977.

The city of Waterbury fire department responded to the fire call and extinguished the fire within a reasonable time on the same day.

The defendant first learned of the fire on Sunday, February 13, 1977, at noon, and was also contacted relative thereto on that day by the owner Mr. Cipriano. Mr. Cipriano took the necessary steps to board up the premises.

The defendant visited the premises on at least three occasions: on Monday, February 14, 1977, in the company of the Waterbury fire marshall; between February 16 and February 18, in the com-

pany of his insurance company representative; and on February 22, 1977, with a Waterbury Health Department inspector. Following each visit the defendant resecured the premises.

On the occasion of the defendant's presence at the premises in the company of the insurance representative, the owner, Mr. Cipriano, also came upon the scene. The defendant testified that he asked Mr. Cipriano to leave the premises so that he could enjoy privacy in his negotiations with the agent. Mr. Cipriano thereupon left.

The personal property items of the defendant, consisting of restaurant equipment and other personal items, remained on the premises and were not removed by the defendant until after his arrest on February 24, 1977.

On February 23, 1977, officers of the Waterbury police department, the Waterbury fire department, and the State police department were granted access to the burned out premises by the landlord Mr. Cipriano. They collected items of evidence at that time which are the subject matter of this motion to suppress, to wit: air samples, photographs, and a charred portion of a floor rug.

No search and seizure warrant was issued for the premises and the consent of the defendant was not sought or granted for the entry or the search and seizure.

Both the State and the defendant, in their briefs, direct the court's attention to the case of *Michigan v. Tyler*, 23 Cr. L 3055 (May 1978). This case is truly pertinent to the instant matter. The court in the *Tyler* case held, in effect, that once the fire had been extinguished and the firefighters had left the premises, a warrant was required to reenter and search the premises, unless there was consent or the premises had been abandoned. The parties hereto are not in conflict with the holding in the *Tyler* case, only in its application to the facts at hand.

The State challenges the defendant's standing to object to the alleged illegal search and seizure. The State concedes that at the

time of the fire the defendant had a leasehold interest in the premises and further enjoyed a reasonable expectation of privacy.

To conclude that the defendant, as suggested by the State, by his words and actions, subsequent to the fire abandoned the proprietary or possessory interest he enjoyed by virtue of his lease, is not supported by the evidence presented at the hearing.

His lease was current and the rental was paid through the month of February. No formal action was taken on the part of either the landlord or the defendant to terminate the lease according to its terms in the event of a fire. The landlord, in fact, requested an additional full month's rental for the month of March from the defendant.

The defendant visited the premises on at least three separate occasions between February 14 and February 22, 1977, for various purposes, but most importantly to check out his restaurant goods and equipment which remained on the premises beyond the defendant's arrest on February 24, 1977. On one such occasion the defendant overtly exercised his possessory interest in the premises by requesting the landlord to leave the premises.

The fact that the landlord rather than the defendant boarded up the premises does not constitute an abandonment in light of all the actions of the defendant thereafter, including his resecuring of the premises following each of his personal visits. Likewise, the bare statement attributed to him that he was "out of business", cannot be given any additional meaning other than the obvious truth of the remark itself, and certainly cannot be stretched to indicate an intent on his part to abandon the premises with all his valuable equipment still in it.

In this respect, therefore, the court finds that as a factual matter, the defendant did not abandon his leasehold interest in the premises, that he had a reasonable expectation of privacy in the burned out and boarded up building and, therefore, has standing to move to suppress evidence based on an alleged improper entry, search and seizure. *Swan v. Superior Court County of Los Angeles*, 87 Cal. Rptr. 280 (1970).

The state further contends that even if the defendant had standing to challenge the evidence seized by the warrantless search, consent to the entry and search was given by an appropriate party, that is to say, the landlord.

It is conceded by the State that no consent was requested or obtained from the defendant.

Many cases are cited by the State in its brief in support of its contention that a landlord, or a joint user, or any person having common authority over the premises may in particular instances be an appropriate party to grant consent to an entry and search.

The issue is one of fact. It is incumbent upon the State to prove legal consent in this matter. *Dotson v. Warden*, 40 Conn. L. J. No. 6, p. 19 at 20 (August 8, 1978); *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S. Ct. 1788, (1968).

In *United States v. John Bernard Industries, Inc.*, 589 F. 2d 1353, 1361 (8th Cir. 1979) the court in interpreting *Rakos v. Illinois*, 99 S. Ct. 421 (1979) stated, "The court held that the proper analysis was to forthrightly focus on the particular defendant's rights under the Fourth Amendment."

The court does not feel it necessary in this matter to attempt to decide complex questions of property law in determining the right of people such as the defendant or of his landlord in giving consent. The matter can be put in focus by the court's statement in the *Dotson* case, supra at page 21: "Courts have understandably been concerned not to sanction warrantless searches authorized by those who do not have a stake in refusing consent."

The court further in the *Dotson* case at page 21 states, "The test applicable to third-party consent requires the state to prove that the consenting party possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988 (1974).

Matlock in a footnote on p. 171, states further that "common authority is, of course, *not to be implied from the mere property interest a third party has in the property.*" *Dotson*, supra p. 21.

The State's claim that the landlord had authority to consent to the entry by legal authorities by virtue of the terms of the lease, is not supported by the facts in light of the holding in *Matlock* and other cases covering this subject.

There is no basis, in fact, for the court to find that the lease was terminated by the defendant, and the landlord's right, if any under the lease, to enter to inspect the fire damage cannot be extended to bestow upon him the right to grant entry to authorities for the purpose of obtaining evidence against the defendant.

The landlord did not enter the premises on February 23, 1977, to examine or inspect the premises for fire damage; rather, he entered in the company of law enforcement agents for the sole purpose of searching for and obtaining evidence of arson. This he had no authority to do. *Chapman v. United States*, 365 U. S. 610, 616 (1960).

Similarly, a "sufficient relationship" in the landlord to the premises or its effects has not been shown by the State's evidence relating to the landlord's pecuniary interest in the property or the *probability* that the piece of rug seized was owned by the landlord. Whether the rug in question was "owned" by the landlord is of no consequence as it would be part and parcel of the leased premises and under the control and possession of the defendant during the term of the lease.

The question of abandonment has already been decided by the court regarding the area of standing and as respects the question of consent, the court likewise finds that the defendant did not abandon the premises as of the time of the police entry on February 23, 1977.

The boarding of the building by the landlord, together with all the facts elicited at the hearing, are not sufficient to support a

finding that the defendant was stripped of his complete authority over the premises including the right to privacy in said premises. The landlord, therefore, was not an appropriate third party to consent to the entry by the legal authorities on February 23, 1977.

Accordingly, the defendant's motion to suppress evidence identified in paragraphs 1, 2, 3 and 4 of said written motion is granted.

Maiocco

_____, J.

Filed July 19, 1979.

APPENDIX C

No. 10505

STATE OF CONNECTICUT	: SUPREME COURT
V.	: STATE OF CONNECTICUT
GEORGIOS ZINDROS	: MARCH 3, 1983

ORDER

THE STATE'S MOTION TO REARGUE

HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT
Donald H. Dowling
CHIEF CLERK

Notice to:
Francis McDonald, Jr., S.A.
Paul E. Murray, A.S.A.
Raymond Shepak
Edward Fitzpatrick
Clerk, Waterbury J.D.
MARCH 4, 1983

APPENDIX D

No. 12961	: SUPERIOR COURT
STATE OF CONNECTICUT	: COUNTY OF NEW HAVEN
VS.	: AT WATERBURY
GEORGIOS ZINDROS	: JUNE 20, 1977

MOTION TO SUPPRESS

The defendant in the above-entitled action, moves this Court, pursuant to C.G.S. § 54-33f, as amended, to suppress as evidence, the following:

1. All tests and results of testing on February 23, 1977, in the restaurant building at No. 812 Highland Avenue, Waterbury, Connecticut, by Trooper George Zuraitis with a Gastechtor Hydrocarbon Surveyor Serial #76234.

2. Charred rug samples taken by Trooper George Zuraitis on February 23, 1977, from the restaurant building at No. 812 Highland Avenue, Waterbury, Connecticut; the glass jar said charred rug samples were placed in, and any test or results of tests obtained from said charred rug samples or said glass jar.

3. All testimony of Trooper George Zuraitis and the testimony of any other prosecution witnesses based upon or derived from their search or seizure of objects from within the interior of the restaurant building located at No. 812 Highland Avenue, Waterbury, Connecticut, on February 23, 1977.

4. All testimony of Fire Marshall Raymond Brodeur and the testimony of any other prosecution witnesses based upon or derived from their search and seizure of objects from within the

interior of the restaurant building at No. 812 Highland Avenue, Waterbury, Connecticut, on February 14, 1977.

As grounds for this motion the defendant states:

1. On February 23, 1977, and February 14, 1977 the defendant was the assignee-lessee in possession of the restaurant building at No. 812 Highland Avenue, Waterbury, Connecticut.

2. The searches and seizures conducted by Trooper George Zuraitis and others on February 23, 1977, and the searches and seizures conducted by Fire Marshall Raymond Brodeur and others on February 14, 1977, were conducted without his consent.

3. Said searches and seizures were not committed incident to the arrest of the defendant.

4. Said searches and seizures were made without a warrant.

5. Said searches and seizures were not made under exigent circumstances.

6. Said searches and seizures were unreasonable and conducted in violation of Article 1 Section 8 of the Connecticut Constitution, in violation of the Fourth Amendment of the Constitution of the United States, and in violation of C.G.S. § 54-33f, as amended.

Wherefore, the defendant requests that this motion be granted.

DEFENDANT,

Raymond J. Shepack

BY _____

RAYMOND J. SHEPACK
HIS ATTORNEY

ORDER

The foregoing Motion having been presented, it is hereby ORDERED that the same be GRANTED.

BY THE COURT

Maiocco, J.

See Decision Dated 16 July '79

CLERK

CERTIFICATE OF SERVICE

Service in accordance with Section 80 of the Practice Book is hereby certified.

Raymond J. Shepack

RAYMOND J. SHEPACK

APPENDIX E

No. 12,961	: Superior Court
State Of Connecticut	: Judicial District Of Waterbury
vs.	: At Waterbury
Georgios Zindros	: November 12, 1980

MOTION TO DISMISS

The defendant hereby moves that the Court dismiss the information against the defendant with prejudice because:

1.) As a result of the granting of the defendant's motion to suppress on July 6, 1979, the State has insufficient evidence upon which to justify the continuing of said information or the placing of the defendant on trial;

2.) As a result of the granting of the defendant's motion to suppress on July 16, 1979, the affidavits relied upon for the issuance of the arrest warrant were tainted and insufficient to establish probable cause that an offense had been committed and that the defendant committed it.

THE DEFENDANT

Raymond J. Shepack

BY _____

RAYMOND J. SHEPACK
HIS ATTORNEY

O R D E R

The foregoing motion to dismiss with prejudice having been heard, it is hereby

ORDERED:

Granted on grounds set forth in Par. 1.

THE COURT

Henebry, J.

_____

JUDGE

APPENDIX F

EXCERPT FROM LEASE (STATE'S EXHIBIT A)

Eleventh. - In the event of the destruction of the demised premises or the building containing the said premises by fire, explosion, the elements or otherwise during the term hereby created, or previous thereto, or such partial destruction thereof as to render the premises wholly untenantable or unfit for occupancy, or should the demised premises be so badly injured that the same cannot be repaired within ninety days from the happening of such injury, then and in such case the term hereby created shall, at the option of the Landlord, cease and become null and void from the date of such damage or destruction, and the Tenant shall immediately surrender said premises and all the Tenant's interest therein to the Landlord, and shall pay rent only to the time of such surrender, in which event the Landlord may re-enter and repossess the premises thus discharged from this lease and may remove all parties therefrom. Should the demised premises be rendered untenantable and unfit for occupancy, but yet be repairable within ninety days from the happening of said injury, the Landlord may enter and repair the same with reasonable speed, and the rent shall not accrue after said injury or while repairs are being made, but shall recommence immediately after said repairs shall be completed. But if the premises shall be so slightly injured as not to be rendered untenantable and unfit for occupancy, then the Landlord agrees to repair the same with reasonable promptness and in that case the rent accrued and accruing shall not cease or determine. The Tenant shall immediately notify the Landlord in case of fire or other damage to the premises.

Office - Supreme Court, U.S.
FILED
AUG 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1800

In The
Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF CONNECTICUT,
Petitioner,

v.

GEORGIOS ZINDROS
Respondent,

On Writ of Certiorari to the Supreme Court
of the State of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

Attorney and Counsel of Record
for the Respondent, Georgios Zindros:

EDWARD G. FITZPATRICK
Sixteen Park Place
Naugatuck, Connecticut 06770
(203) 729-4586

RAYMOND J. SHEPACK
90 Church Street
Naugatuck, Connecticut 06770
(203) 729-2217
Counsel For Respondent

QUESTIONS PRESENTED

1. Whether a landlord may properly consent to a warrantless police and fire search of burnt-out premises leased exclusively to the tenant?

2. Whether the tenant possessed a reasonable expectation of privacy from a warrantless governmental intrusion and search occurring eleven (11) days after the fire?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1800

THE STATE OF CONNECTICUT,

Petitioner,

v.

GEORGIOS ZINDROS,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Georgios Zindros, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on February 15, 1983.

JURISDICTION

The Respondent does not concede jurisdiction as to the purported "good faith" issue. Although the good faith issue was pressed before the Connecticut Supreme Court, it was not passed upon by the Court. See § A, infra.

STATEMENT OF THE CASE

Facts

On February 12, 1977, a fire occurred at a pizza restaurant operated by and leased exclusively to the defendant, Georgios Zindros. (Tr. 6, 54). The building was owned by one Louis Cipriano. (Tr. 54). The trial court found that the premises suffered damage to the interior from the fire and smoke and that the local fire department extinguished the fire within a reasonable time on the same day. (Memo. of Decision, Pet. App. B p. 1b).

The landlord boarded up the premises on February 13, 1977. (Tr. 58). The owner testified that he had paid "$51,000.00 or $52,000.00" for the premises in 1975 (Tr. 55) and he received a $21,000.00 insurance settlement for the fire damage. (Tr. 56). The defendant was informed of the fire by his daughter on February 13, 1977, and told that the place had "boards in front". (Tr. 123). The defendant then proceeded to the premises, saw that it was boarded, and departed. (Tr. 123). The defendant then contacted the Fire Marshall and they met at the premises on February 14th in the morning. (Tr. 107). The defendant entered the premises by removing the plywood from the front door. (Tr. 108). The fire was out; there was no smoldering or smoking at that time. (Tr. 109). When he departed from the premises on the 14th the defendant resecured the premises by hammering the plywood back on the door. (Tr. 109).

Testimony by the defendant reveals that he had substantial restaurant equipment located in the premises at the time of the fire. (Tr. 109). This was corroborated by the testimony of Trooper Zuraitis who testified that he viewed an "oven", "booths", "refrigerator" and restaurant facilities in general within the premises at the time of the warrantless search on the 23rd. (Tr. 52). In fact the State stipulated that there was substantial restaurant property in the premises on February 16th. (Tr. 112). With regard to the property, the defendant re-entered the premises on February 16, 1977 with an appraiser to determine the extent of damage to his equipment. (Tr. 113). He testified that he wanted to "fix the restaurant and go back to work" (Tr. 118) since his restaurant equipment, including ovens, stoves, and refrigerators was repairable. (Tr. 119). During this visit to the premises with the appraiser, the

defendant noticed the landlord inside the building and told him to "get out." (Tr. 65). The landlord then left the premises. (Tr. 65). On several occasions subsequent to February 16th the defendant re-entered his premises and each time re-secured them (Tr. 137) because he wanted "to stay and start business" (Tr. 138), "to put the place in order again" (Tr. 132), and because "...I had my merchandise in there." (Tr. 143). Further, the defendant wanted to keep the children from breaking in. (Tr. 137).

The trial court found that the defendant had not abandoned his leasehold interest in the premises. (Memo. of Decision, Pet. App. p. 3b). The court further found that the bare statement attributed to the defendant that he was "out of business" cannot be given any additional meaning other than the obvious truth of the remark itself, and certainly cannot be stretched

to indicate an intent on the defendant's part to abandon the premises with all his valuable equipment still in it. (Memo. of Decision, Pet. App. p. 3b).

The defendant lived in Waterbury. (Tr. 100). The warrantless search occurred eleven days after the fire. (Tr. 13). There was no exigency to search at that time. (Tr. 109). Prior to the warrantless search on February 23rd, the defendant was regarded as a "suspect" by the police. (Tr. 19). They knew he operated the restaurant. (Tr. 19). Indeed, Waterbury Police Detective Solomita testified that he may have eaten there on occasion. (Tr. 15). Other city officials from the Fire Marshall's office and the Health Department knew of the defendant's interest in the premises and had been in contact with him on several occasions subsequent to the fire. (Tr. 23, 90, 91). On February 23rd, Detective Solomita, despite his knowledge of the

defendant's interest in the premises, never contacted the defendant. Instead he went to the owner's office on Fairfield Avenue and requested from him permission to search the Highland Avenue premises. (Tr. 13). The owner then proceeded to the premises, removed the plywood from the front door with a wrecking bar (Tr. 60), and admitted Detective Solomita, Officer Gary of the Waterbury Police Department, Deputy Fire Marshall Murphy and Trooper Zuraitis of the State Police. (Tr. 40, 41). When the officers entered the premises leased to the defendant, they had no warrant. Neither did they have the consent of the defendant. (Tr. 14, 15, 35, 49, 138, 139). The purpose of this entry was to "take evidence" according to the testimony by the owner. (Tr. 61). Upon entry, they took photographs and collected other items of evidence, including air samples and a piece of carpet charred by the fire with the

consent of the owner. (Tr. 42, 43).

There was no testimony that these officials made any inquiry of the owner as to his authority to consent to this warrantless search. In fact, Trooper Zuraitis testified that he never spoke to the owner. (Tr. 15, 41). Despite Detective Solomita's knowledge that the defendant operated the restaurant (Tr. 19), there is no testimony that he made any inquiry of the owner as to his authority to permit a warrantless search of his tenant's premises. The lease between the owner and the defendant provided in part that the owner had the right to repair the premises in the event of fire and had the option to declare the lease null and void. (Pet. App. F p. 1f). The owner never told the defendant that the lease was terminated. (Tr. 142). In fact, the owner demanded rent for the month succeeding the fire. (Tr. 136).

Rulings Below

The respondent accepts as accurate the petitioner's statement of the rulings below subject to the following exceptions. The Connecticut Supreme Court explicitly did not decide whether there exists a good faith exception to the exclusionary rule because it deemed the police conduct unreasonable under the circumstances and hence there was no need to decide whether an exception to the exclusionary rule exists, 189 Conn. at 254, 255. (Pet. App. A at pp. 23a, 24a).

ARGUMENT

REASONS FOR DENYING THE WRIT

A.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER THE "GOOD FAITH" CLAIM

The decision of the Connecticut court in State v. Zindros, 189 Conn. 228, 456 A.2d 288 (1983), is an inappropriate subject for the granting of a writ of certiorari by this Court. At the outset, the respondent believes that it is critical to note that the present case cannot fairly be characterized as a "good faith" decision. The record below does not support the petitioner's "good faith" claim. The issues of "apparent authority" or "reasonable good faith belief" were neither presented to the trial court nor addressed in the trial court's memorandum of decision. (189 Conn. 228, 251; Pet. App. A p. 21a). No testimony was presented regarding the good faith of the police officers. Although

the "good faith" and "apparent authority" claims were briefed and argued in the Connecticut Supreme Court, that court, after examining the evidence, concluded that the police did not demonstrate the necessary good faith belief and therefore the court explicitly found no need to "decide whether such an exception to the exclusionary rule exists." State v. Zindros, supra, 254, 255. (Pet. App. A pp. 23a, 24a).

The state of the record below underscores several reasons why the granting of certiorari would be inappropriate. In the first instance, the jurisdiction of this Court to review the "good faith" claim is not at all clear. In Illinois v. Gates, ____ U.S. ____, 76 L.Ed. 2d 527, 103 S.Ct. ____ (1983), this court discussed the "not pressed or passed upon below" rule, but did not decide whether the rule was jurisdictional or prudential. Id. 538. If in fact the rule is jurisdictional as the

decisions in Crowell v. Randell, 10 Pet. 368, 391 (1836), McGoldrick v. Compagnie Generale, 309 U.S. 430, 434-35 (1940), State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154, 160 (1945) and Hill v. California, 401 U.S. 797, 805-6 (1971), suggest, then this Court is without jurisdiction to reach the "good faith" claim due to the fact that the Connecticut Supreme Court did not pass upon the issue.

B

WEIGHTY PRUDENTIAL AND POLICY CONCERNS DICTATE AGAINST GRANTING THE WRIT

Regardless of whether this Court determines that the "not pressed or passed upon below" rule is jurisdictional or prudential, this case presents many of the same policy and prudential concerns that dissuaded this Court from deciding the "good faith" issue in Illinois v. Gates, supra. These considerations militate

strongly against granting certiorari in the present case. The policy considerations expressed in Illinois v. Gates, supra, 76 L.Ed. 29, 527 at 537-38, with regard to this Court's relationship to state courts apply with equal force here. The Connecticut courts should be given an opportunity to consider this "issue of unusual significance", Id., 76 L.Ed. 2d 527 at 539, and fashion an appropriate remedy.

But, perhaps more important is the state of the factual record in this case. Here, as in Gates, the record contains little, if anything, regarding the subjective good faith of the officials that searched the Zindros premises. There was no testimony that the police subjectively believed this search was valid. Further, as the Connecticut Supreme Court explicitly noted, the record shows "that the belief of the officers that the search was proper

was unreasonable under the circumstances." State v. Zindros, supra, 255. (Pet. App. A p. 24a).

An examination of the record below demonstrates that the police were not at all mistaken as to the essential facts. The warrantless search occurred eleven days after the fire (Tr. p. 13) and therefore, no exigency to search existed at that time. (Tr. p. 109). At the time of the search the defendant was a suspect. (Tr. p. 19). The defendant was not contacted concerning giving any consent to the search. (Tr. pp. 14-15, 35, 49, 138-39). He lived in Waterbury (Tr. p. 100; 189 Conn. 228, 249; Pet. App. A p. 19a), and the police and the fire officials involved knew he was there. (Tr. pp. 23, 90, 91, 107-8; 189 Conn. 228, 249; Pet. App. A p. 19a). He had not fled nor is it claimed that he was likely to do so and this was eleven days after the fire. (189 Conn. 228, 249; Pet. App. A p. 19a).

The police knew that the consenting party was the owner of the restaurant building that was currently occupied by the defendant. (Tr. pp. 13, 19, 52). Yet, there was no testimony that the police made any inquiry of the owner as to his authority to permit a warrantless search of his tenant's premises.

Further, Detective Lieutenant Solomita was one of the two officers dispatched to seek the landlord's consent to enter the premises. (Tr. p. 13). Solomita lived in the area of the defendant's pizza business (Tr. p. 15) and had even been a patron there prior to the fire. (Tr. p. 15). When they entered for the search, after the landlord pried off the plywood on the front door (Tr. pp. 14, 17), the defendant's equipment was still there. (Tr. p. 52). They initially had seen it there eleven days earlier when police and fire officials were there with the defendant as well as

the landlord. (Tr. p. 29).

As in Illinois v. Gates, supra, this Court's consideration of whether to modify the exclusionary rule would plainly benefit from a record containing facts supporting the subjective good faith of the police. The present record is bereft of such facts. Also the state of the record, specifically the Connecticut court's failure to pass on the "good faith" issue, distinguishes this case from the decisions in People v. Quintero, ____Colo.____, 657 P.2d 948 (1983) and Commonwealth v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982) on which this Court has granted writs of certiorari to consider the "good faith" issue. See No. 82-963; 51 LW 3913 and No. 82-1711; 51 LW 3913-14. The courts in both People v. Quintero, supra, 657 P.2d at 950-951 and Commonwealth v. Sheppard, supra, 441 N.E. 2d at 725-26, unlike the Connecticut Supreme Court, explicitly reached the "good

faith" issue and rejected the application of the purported exception. The Connecticut court, far from rejecting the good faith claim, failed to even decide if such an exception existed. Further, in People v. Quintero, supra, 657 P.2d at 950-51 and Commonwealth v. Sheppard, supra, 441 N.E. 2d at 725-26, and unlike the present case, the good faith of the police was not in question.

The inadequacy of the record below exemplifies the wisdom of this Court's remarks in Illinois v. Gates, supra:

> "...[F]idelity to the [not pressed or passed upon below] rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances. In Justice Harlan's words, adherence to the rule lessens the threat of 'untoward practical ramifications...' not foreseen at the time of the decision." Id. 76 L.Ed. 2d 527 at 539. (Citations omitted).

This Court should not grant certiorari to review the "good faith" claim.

C

THE DECISION BELOW IS A PROPER APPLICATION OF THE EXCLUSIONARY RULE TO THE FACTS

The issue raised by the present case is whether the Connecticut courts erred in determining that the landlord's third party consent was invalid. Because the case involves nothing more than the application of settled precedents to the facts, the respondent contends that the decision is an inappropriate subject for Supreme Court review.

Despite the petitioner's assertion to the contrary, this is precisely a case "in which the landlord's right to enter and inspect is being advanced as a smoke screen to justify a landlord's consent to an intrusive search into private areas where the landlord has no interest except a desire to cooperate with the authorities." (Pet. Br. p. 10). The trial court expressly

found that "[T]he landlord did not enter the premises on February 23, 1977, to examine or inspect the premises for fire damage; rather he entered in the company of law enforcement agents for the sole purpose of searching for and obtaining evidence of arson....". (Memo. of Decision, Pet. App. B p. 5b).

Further, the landlord did not "enlist [ ] the aid of the police for the purpose of determining the cause of the conflagration." (Pet. Br. p. 9). Quite to the opposite, the police sought out the landlord and requested permission from him to search the premises. (Tr. pp. 13, 61).

The petitioner here and in the courts below predicates the alleged validity of the landlord's consent on the assertion that the "lessor had, by operation of a lease provision and the occurrence of the fire, a right of possession superior to that of the lessee." (Pet. Br. p. 9)

(189 Conn. 228, 244; Pet. App. A p. 14a). This claim was considered and properly rejected by the courts below.

The general rule of law is that a landlord may not consent to a search of the tenant's premises and this is true even where the landlord has some right to enter for purposes of inspecting and cleaning. Chapman v. United States, 365 U.S. 610, 616-17 (1961).

When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is incumbent upon it to prove "that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." United States v. Matlock, 415 U.S. 104, 171 (1974).

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which

justifies the third party consent does not rest upon the law of property, with its attendant historical and legal refinements. See Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed. 2d 828 (1961) (landlord could not validly consent to the search of a house he rented to another), Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed. 2d 856 (1964) (night hotel clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched." Id. p. 171.

Applying these precedents the trial court concluded that the landlord's consent on either the common authority or other sufficient relationship criteria of Matlock had not been proven by the State. (Pet. App. B at pp. 4b-5b). These findings were affirmed by the Connecticut Supreme Court. (189 Conn. 228, 248; Pet. App. A p. 18a). The trial court specifically found that the defendant had not abandoned the premises;

(Memo. of Decision; Pet. App. B pp. 3b, 5b) that the defendant had not terminated the lease; (Id. p. 5b) that the landlord had requested an additional month's rental from the defendant; (Id. p. 3b) and that the defendant had overtly exercised his possessory interest in the premises by requesting the landlord to leave. (Id. p. 3b). Significantly, there was no trial court finding or evidence that the landlord exercised his alleged "absolute right to temporary possession to make necessary repairs." (Pet. Br. p. 10) (189 Conn. 228, 248; Pet. App. A p. 18a).

Yet, contrary to the holding in Matlock and these factual findings the petitioner seeks to utilize property law via the terms of the lease to validate the landlord's consent to search. This approach, rejected in Matlock, Chapman, Stoner, and the Connecticut Supreme Court,

should not form the basis for a granting of a writ of Certiorari. As the Connecticut Supreme Court recognized, "it is the use of the property that is controlling, not the potential right to use." (189 Conn. 228, 247; Pet. App. A p. 17a) (emphasis in original). The petitioner has not presented any reasons why this Court should deviate from the precedents established in Chapman and Matlock, supra. Courts should be concerned not to sanction warrantless searches authorized by those who do not have a stake in refusing consent. Dotson v. Warden, 175 Conn. 614, 622, 402 A.2d 790 (1978).

Finally, to the extent that the petitioner is contending that the police conduct was the "most reasonable and appropriate course of action in light of all the circumstances and the lease," (Pet. Br. p. 11), it must be observed that "courts have strongly supported the preference to

be accorded searches under a warrant and have explicated that a doubtful or marginal case may be sustainable where one without it would fail. See, e.g. United States v. Ventresca, 380 U.S. 102, 106, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965); Jones v. United States, 362 U.S. 257, 270, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960)" State v. Zindros, supra, 254-55. The Connecticut courts did not misapply the exclusionary rule.

D

THE DEFENDANT'S REASONABLE EXPECTATION OF PRIVACY WAS FULLY CONSIDERED IN THE COURTS BELOW

The petitioner in Part IV of the brief argues that the Defendant had no reasonable expectation of privacy requiring suppression of the evidence. (Pet. Br. p. 12). The petitioner does not challenge the applicable law but argues instead that the facts "compel a finding that the tenant here had no actual expectation of privacy."

(Pet. Br. p. 13). In effect, the petitioner is asking this Court to retry the case. No claim has been made that an individual is being deprived of a right secured by the Constitution. Therefore, this Court should not sit to retry issues of fact heard and determined by the properly constituted tribunals of the state having jurisdiction of the subject. Portland Ry. Co. v. Oregon R.R. Commission, 229 U.S. 397, 412 (1912); also Evco v. Jones, 409 U.S. 91, 94 (Per Curiam, 1972); Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952).

The defendant's expectation of privacy was fully considered by the courts below. As the Connecticut Supreme Court noted:

> "There was ample evidence to support the trial court's determination that the defendant had a reasonable expectation of privacy 'in the burned out and boarded up building' as of February 23, 1977. The court properly found, on this issue as well as that of consent, that the defendant had not abandoned the leased premises.... On those occasions, between February

> 14 and February 23, when the defendant left the premises, he secured them. He not only said that it was his intention to stay, but he always secured the site upon leaving because 'I had my merchandise in there'. The defendant said that he had damaged personal property inside this building which he claimed was worth approximately $6,750. He said he was keeping the premises because he intended to reopen the business and he wanted to 'fix it so I could work'. No formal action was taken by either the defendant or the landlord to terminate the lease according to its terms in the event of a fire. The landlord did not ask him to leave and turn the premises over to him. His rent was paid through the end of February and so he felt he had a right to remain there until at least that time 'because of my rent paid.' He answered 'yes' to the question: 'Was it your intention to keep people out of the premises unless they were there with your permission?' There was thus evidence before the court that, if believed, actually demonstrates the defendant's subjective expectation of privacy."

State v. Zindros, supra, 240-41, (Pet. App. A pp. 10a-11a) (footnotes omitted).

Furthermore, the petitioner's argument seems to suggest that the defendant's expectation of privacy was not one which society would recognize as reasonable. The

short answer to this claim is that the decisions in Michigan v. Tyler, 436 U.S. 499 (1978); State v. Zindros, supra, 242 ("Zindros' expectation of privacy...was such that society would recognize it as reasonable."); and State v. Schonagel, 189 Conn. 752, 761, ____A.2d____ (1983) ("It suffices to note that a fire does not necessarily diminish the owner's reasonable expectation of privacy in the burned building.") are to the contrary.

The respondent respectfully submits, therefore, that this issue is inappropriate for Supreme Court review because it involves nothing more than the resolution of factual issues.

CONCLUSION

The courts below did not misapply the exclusionary rule. The decisions represent the application of settled legal principles to the facts as found by the trial court. Nor is this case the proper vehicle to discuss the possible "good faith" exception to the exclusionary rule. The Court is without jurisdiction to reach the "good faith" issue because the Connecticut Supreme Court did not pass upon the issue. Further, weighty policy and prudential concerns including an inadequate factual record militate strongly against the consideration of the "good faith" claim. The respondent, therefore, respectfully requests that this Court deny the writ of certiorari.

Respectfully submitted,

GEORGIOS ZINROS - RESPONDENT

BY _____
EDWARD G. FITZPATRICK
His Attorney

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FILED
SEP 6 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1800

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Supreme Court of the United States

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THE STATE OF CONNECTICUT,

Petitioner,

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GEORGIOS ZINDROS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Connecticut

PETITIONER'S REPLY BRIEF

FRANCIS M. MCDONALD
State's Attorney and Counsel of Record

PAUL E. MURRAY
Assistant State's Attorney and Counsel of Record

300 Grand Street
Waterbury, CT 06702
P. O. Box 1245
(203) 756-4431

REPLY BRIEF

Pursuant to Rule 22.5, the petitioner submits the following in reply to the respondent's brief in opposition.

I.

THE GOOD FAITH EXCEPTION IS PROPERLY BEFORE THIS COURT FOR REVIEW

Citing *Illinois v. Gates*, —U. S.—, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the respondent's brief in opposition urges this Court not to grant certiorari because the good faith exception to the exclusionary rule was not pressed or passed upon in the Connecticut Supreme Court.

In *State v. Zindros*, however, the Connecticut Supreme Court acknowledged that the "good faith" exception was briefed and argued by both parties. 189 Conn. 228, 251 n. 29, 456 A.2d 288, 301 n. 29 (1983) (Petition, App. A at 21a n. 29). The Connecticut court went on to hold that the doctrine would not be applicable to this case because "the belief of the officers that the search was proper was unreasonable." 189 Conn. at 255 n. 32, 456 A.2d at 302 n. 32 (Petition, App. A at 24a n. 32). The Connecticut Supreme Court did pass upon the application of this exception to the fourth amendment exclusionary rule, and the petitioner pressed to have the exception adopted and applied to this case in the Connecticut Supreme Court.

The respondent also claims that the record is inadequate for such a review. He states the record contains little, if anything, regarding the subjective g[illegible] of the officers.

The Connecticut Supre[illegible] r found unreasonable under the circumstances "the belief of the [illegible] that the search was proper." 189 Conn. at 255 n. 32, 456 A.2d at 302 n. 32 (Petition, App. A at 24a n. 32). There was ample evidence in the record of the practical and justifiable need for the officers to obtain entry from the landlord who had boarded up the burned-out premises. The record, it is submitted, is adequate for review of this issue.

II.

RECENT DEVELOPMENTS IN THIS COURT SUPPORT THE GRANTING OF THE PETITION

Since this petition was filed this Court has accepted three cases for review involving the doctrine. *See Massachusetts v. Sheppard* (82-963), —U. S.—, 103 S.Ct. 3534 (1983), *granting cert. to* 387 Mass. 488, 441 N.E.2d 725 (1982); *Colorado v. Quintero* (82-1711), —U. S.—, 103 S.Ct. 3535, *granting cert. to* 657 P.2d 948 (Colo. 1983); *United States v. Leon* (82-1771), —U. S.—, 103 S.Ct. 3535, *granting cert. to* 701 F.2d 187 (9th Cir. 1983).[1]

Not one of the accepted cases concerned the officers' reasonable and justifiable reliance upon a third party's consent to search.

The petitioner submits that this Court should grant certiorari in this case as consideration of the good faith belief exception requires consideration of the application of the doctrine as well.

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1. The respondent claims that two of those cases clearly decided not to adopt the "good faith" exception. The respondent seems to argue that the application of the exception to the facts is not worthy of review by this Court. In *Massachusetts v. Sheppard*, the Massachusetts three-judge plurality opinion refused to adopt the exception in view of decisions of this Court, but the concurring opinion refused to find "reasonable" good faith and to adopt the exception. *See Massachusetts v. Sheppard*, 387 Mass. 488, 511-12, 441 N.E.2d 725, 738 (1983) (Liacos, J., concurring, joined by Abrams, J.). In *Colorado v. Quintero*, the dissenting Colorado justice pointed out that the Colorado majority not only rejected the good faith exception but also refused to apply the very similar Colorado "good faith" exception statute to the facts of that case. *See Colorado v. Quintero*, 657 P.2d 948, 953 (1983) (Rovira, J., dissenting).

These cases illustrate that the exception and its application require joint consideration.

CONCLUSION

The petitioner submits that the petition for a writ of certiorari should be granted for the reasons urged in the petition.

Respectfully submitted,

THE STATE OF CONNECTICUT-PETITIONER

Francis M. McDonald
State's Attorney

Paul E. Murray
Assistant State's Attorney